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**Supreme Court of the United States**

OCTOBER TERM, 1979

**No. A-1105**

IMPERIAL IRRIGATION DISTRICT, et al.,  
*Petitioners,*

v.

BEN YELLEN, et al.,  
*Respondents.*

**APPENDIX TO PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT**

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## APPENDIX A

United States Court of Appeals,  
Ninth Circuit.

Aug. 18, 1977.

**UNITED STATES of America,  
Plaintiff-Appellee,**

v.

**IMPERIAL IRRIGATION DISTRICT, a  
corporation, Defendant-Appellee,**

**John M. Bryant et al.,  
Defendants-Appellees,**

**State of California, Defendant-Appellee,**

**Ben Yellen et al., Appellants.**

**Ben YELLEN et al., Plaintiffs-Appellees,**

v.

**Cecil D. ANDRUS\* et al.,  
Defendants-Appellants.**

**Ben YELLEN et al., Plaintiffs-Appellees,**

v.

**Cecil D. ANDRUS \* et al.,  
Defendants-Appellants,**

**W. L. Jacobs et al.,  
Defendants-Appellants.**

**Nos. 71-2124, 73-1333, 73-1388.**

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\* Walter J. Hickel, as Secretary of the Interior, was the originally named defendant. We substitute the name of his present successor in office. F.R.App.P. 43(c).

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Appeals from the United States District Court for the Southern District of California.

Before BROWNING and KOELSCH, Circuit Judges, and WOLLENBERG,\* \* District Judge.

WOLLENBERG, District Judge:

The Imperial Valley in southern California is a highly productive agricultural area. This is due to an extensive irrigation system which distributes water obtained from the Colorado River, for without this irrigation water the Imperial Valley would be an unproductive desert. At issue in these cases is whether certain restrictions in the reclamation laws limit the delivery of irrigation water to resident landowners and whether water deliveries are limited to only 160 acres of the property held by each private landowner.

#### I. Historical Overview.

Because it is almost entirely below sea level, it was recognized as early as the middle of the nineteenth century that irrigation of the Imperial Valley with water diverted from the Colorado River was possible by gravity flow. A private corporation organized in 1896 as the California Development Corporation made the initial appropriations and diversions of Colorado River water. The water was taken from the River just north of the boundary between Mexico and the United States. However, in order to avoid high mesa and sandhill country north of the international boundary that separated the Colorado River from the Imperial Valley, the water was carried by canal for approxi-

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\* \* The Honorable Albert C. Wollenberg, Senior United States District Judge for the Northern District of California, sitting by designation.



mately 50 miles through Mexico. After the canal re-entered the United States, the water was distributed to land in the Imperial Valley through a system of irrigation canals owned by seven mutual water companies. These water companies had been organized by the California Development Company and were later acquired by the individual landowners whose land received the water.

In 1905, the Colorado River broke through its banks with disastrous results. The River changed its course and for many months flowed through the washed-out intake of the California Development Company into the canal in Mexico and then into the Imperial Valley. The flood created the Salton Sea with a surface area of over 330,000 acres within the Imperial Valley and threatened to destroy the entire area. The California Development Company could not contain the River. Danger to the tracks of the Southern Pacific led that company to advance funds to the California Development Company to control the River, and the railroad took a controlling interest in the Development Company as security. The railroad eventually succeeded itself in closing the breach in the river bank and returned the River to its channel. In 1916, the railroad foreclosed on the Development Company's interests and then transferred those interests to the Imperial Irrigation District (hereinafter "District").<sup>1</sup>

At first, the District distributed water to the seven mutual water companies on a wholesale basis. By 1923, however, the District acquired all of the mutual water companies. Since then, it has been the only entity diverting, transporting, and supplying water from the Colorado River to agricultural lands in the Imperial Valley.

The interstate allocation of water from the Colorado River, control of flooding, regulation of water supplies on

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<sup>1</sup> The District, an agency of the State of California, was formed in 1911. See Cal. Water Code §§ 20500 *et seq.*

a predictable and useful basis, and the construction of a canal to the Imperial Valley that did not pass through Mexico were major concerns of not only Imperial Valley landowners but of the seven states in the Colorado Basin during the early years of the 1900s. Extensive efforts to resolve these problems led first to the agreement in 1922 between Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming known as the Colorado River Compact and then to the passage in 1928 of the Boulder Canyon Project Act (hereinafter "Project Act"). 45 Stat. 1057, 43 U.S.C. §§ 617 *et seq.* The Project Act provided, *inter alia*, for ratification of the Colorado River Compact, the construction of Boulder (now, Hoover) Dam, and the construction of Imperial Dam where water was to be diverted to a canal running to the Imperial Valley. The canal was to run entirely through United States territory and hence received the name All-American Canal.

By the time the Project Act became effective in 1929, extensive private efforts had resulted in irrigation of almost 425,000 acres in the Imperial Valley. Since then, very little additional irrigated land has been added in the District. In 1932, the District entered into a contract with the United States providing for the construction of the Imperial Dam and the All-American Canal by the United States and repayment of certain costs by the District. Landowners in the Coachella Valley, north of the Imperial Valley, formed their own water district and eventually negotiated their own contract with the government for construction of facilities to deliver water to that Valley. Water delivery to the Imperial Valley through the All-American Canal began in 1940 and since 1942 the District's entire water supply has been carried through the All-American Canal. The District subsequently disposed of its interests in Mexico.

The 1932 contract with the District did not specifically provide for any acreage limitations on private lands receiving water through the massive projects being built by

the United States. Due to the combination of a 1933 letter from the Secretary of the Interior to the District and the inaction of the Department of the Interior, no acreage limitations that were contained in the reclamation laws were enforced with respect to privately owned lands in the Imperial Valley. In 1964, the Solicitor of the Department of the Interior concluded that the previous Department interpretation of the law and administrative practice were incorrect and that the acreage limitations should apply to privately owned lands.

The Department of the Interior attempted to negotiate a new contract with the District that would incorporate acreage limitations but the negotiations failed. In 1967, therefore, the government filed an action for declaratory relief against the District. The complaint sought a declaratory judgment that the land limitation provisions of the reclamation law applied to privately owned lands in the District that received Colorado River water through the All-American Canal. The government specifically relied upon Section 46 of the Omnibus Adjustment Act of 1926, 44 Stats. 649, as amended, 43 U.S.C. § 423e (hereafter "Section 46"),<sup>2</sup> as the acreage limitation statute that applied.<sup>3</sup>

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<sup>2</sup> In pertinent part, Section 46 provides that:

No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States . . . and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. . . . Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one

In its suit, the government did not rely upon Section 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C. § 431. That statute contains an earlier version of acreage limitations on lands receiving water through federal reclamation projects. It also restricts the delivery of water through federal reclamation projects to lands owned by residents of the reclamation project area.<sup>4</sup> A group of Imperial Valley residents, dissatisfied with government non-enforcement of this statute in the Imperial Valley, brought suit in 1969 against the government to enforce the residency requirement of Section 5 of the Reclamation Act of 1902.

The government thus found itself in the position of claiming that, despite its previous inaction, one section of the reclamation law applied in the Imperial Valley while also defending its nonapplication of another section of the reclamation law which is in one respect similar to the stat-

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hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior. Because of California's community property laws, a husband and wife may own 320 acres and still be in compliance with the reclamation law. For the sake of consistency with the statutory language, the limitation referred to throughout this opinion will be 160 acres.

<sup>3</sup> For a more detailed historical account, see *United States v. Imperial Irrigation District*. 322 F.Supp. 11, 12-15 (S.D.Cal.1971). Additional historical data will be referred to in the course of this opinion.

<sup>4</sup> The precise scope of this restriction was hotly contested in the proceedings below.

ute it sought to apply. The cases were heard by two different judges and eventually the government's position was rejected in both cases. Before reaching the substantive matters raised in the appeals from these two decisions, we are obliged to consider procedural complications and questions of standing.

## II. Standing.

### A. *Yellen v. Andrus*, Nos. 73-1333, 73-1388.

This action (hereinafter "the residency case") was instituted by several individuals who resided within the boundaries of the Imperial Irrigation District but who owned no farm land in the District or anywhere else in the United States. They sought to compel the Secretary of the Interior and various officials of the Department of the Interior to enforce the residency requirements of Section 5 of the Reclamation Act of 1902, 43 U.S.C. § 431.<sup>5</sup> Their case was brought in the form of a mandamus action under 28 U.S.C. § 1361.

In 1971, the district court granted partial summary judgment against the government, holding that 43 U.S.C. § 431 applies to private lands within the Imperial Irrigation District receiving water from the Boulder Canyon

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<sup>5</sup> In referring to the sale of rights to the use of water delivered through federal reclamation projects to private landowners, 43 U.S.C. § 431 provides, in pertinent part, that "no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land." Act of June 17, 1902, c. 1093 § 5, 32 Stat. 389. Section 5 also contains limitations on the size of tracts for which rights to the use of water may be sold and conditions the permanent attachment of such rights on full payment by the landowner. The complaint did not seek enforcement of these portions of Section 5.

Project through the All-American Canal. *Yellen v. Hickel*, 335 F.Supp. 200 (S.D.Cal.1971). Thereafter, various land-owners in the Imperial Valley intervened and raised arguments not previously set forth by the government. A full trial on the merits was then held. The district court issued findings of fact and conclusions of law and again held for the plaintiffs. *Yellen v. Hickel*, 352 F.Supp. 1300 (S.D.Cal.1972). Judgment in favor of the plaintiffs was entered and both the government and the intervening land-owners appealed.<sup>6</sup>

The issue of plaintiffs' standing to bring this action was considered at various times in the district court proceedings and was resolved in favor of the plaintiffs. See 352 F.Supp. at 1303-1304. In light of more recent Supreme Court decisions, this Court has not adopted the test for standing used by the district court in this case. *Bowker v. Morton*, 541 F.2d 1347, 1349 n.3 (9th Cir. 1976). At this Court's invitation, the parties have submitted additional briefs on the standing question in light of the *Bowker* decision.<sup>7</sup>

In *Bowker v. Morton*, a group of small family farmers in one area of California sought to compel the government to apply the federal reclamation laws, particularly the residency requirement of 43 U.S.C. § 431 and the statutes concerning excess land holdings, to an irrigation project in another area of California. Although injunctive relief against other landowners was sought, the most the *Bow-*

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<sup>6</sup> The government's appeal is No. 73-1333, and the appeal of intervening landowners is No. 73-1388.

<sup>7</sup> While the standing issue was raised below, at one time during the course of this appeal it may not have been pressed by the appellants. However, "since jurisdiction to decide the case is implicated," the issue must be considered. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

ker plaintiffs could have obtained was an order requiring the government to enforce the reclamation laws and discontinue supplying water to lands not in compliance with the law. That is essentially the relief sought by the plaintiffs in this case, and the standing test enunciated in *Bowker* applies in this case as well. Distilled from the recent cases of *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), and *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), that test, "compactly put, . . . is that the plaintiffs must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendants' action (c) which injury will be redressed by the remedy sought." 541 F.2d at 1349. Application of that test to the facts of this case leads to the conclusion that the plaintiffs have no standing to maintain this action.

In their amended complaint,<sup>8</sup> the plaintiffs alleged that they resided within the boundaries of the Imperial Irrigation District and in the vicinity of privately owned lands which are irrigated by water supplied through the federal reclamation project. They alleged that the only source of irrigation water in the Imperial Valley is the federal project. Much of the irrigated farm land in the area was alleged to be owned by persons who were not bona fide residents on the land and who were not residing in the neighborhood of the land. None of the plaintiffs owned any farm land and they alleged a desire to own farm land in the area. Because of the scant rainfall and lack of any other irrigation source, the plaintiffs would have to purchase lands irrigated with water from the federal reclamation project in order to fulfill their desire to own farm land. The essence of their case is that their ownership desires have been

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<sup>8</sup> The record on this appeal does not include a copy of the amended complaint. However, the amended complaint does appear in the record of the companion appeal, No. 71-2124, in the Clerk's Transcript, Volume I, at pages 206-211.

blocked because the government, by failing to enforce the residency provision of 43 U.S.C. § 431, permits irrigation water to be received by nonresident owners of farm land and that enforcement of the law will result in making farm land available for purchase at prices plaintiffs could afford. The district judge found that about half of the farms in the Imperial Irrigation District were owned by nonresidents and that enforcement of the residency requirement would bring "an immediate and substantial decline in the market value of farm land" in the District. He made no findings concerning the proportion of the farm acreage in the District owned by nonresidents or what his term "substantial decline" meant in terms of actual prices for farm acreage.<sup>9</sup>

In *Bowker*, the plaintiffs had not alleged that they desired to buy land in the area which they sought to bring under the provisions of the federal reclamation laws, and they did not state any prices which they could afford to pay should land be available for purchase. Consequently, their claim that failure to enforce the federal reclamation laws resulted in the unavailability of land for purchase at "reasonable" prices was held to fail to set out "a particularized injury resulting from the defendants' action." 541 F.2d at 1350. Here, plaintiffs do allege a desire to purchase farm land. However, there is nothing in the record to indicate what price any plaintiff could afford to pay for any particular farm or that enforcement of the residency requirement of 43 U.S.C. § 431 will lead to a decline in farm land prices sufficient to bring those prices into a range where plaintiffs could afford to purchase a particular farm.<sup>10</sup>

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<sup>9</sup> Findings of Fact XXIX, XXX, 352 F.Supp. at 1317.

<sup>10</sup> Plaintiffs cannot assert injury in their status as taxpayers. *Bowker v. Morton*, *supra*, 541 F.2d at 1349 n.2. In addition, they cannot claim injury from any failure of the government to discharge its duty to the public. *Turner v. Kings River Conservation District*, 360 F.2d 184, 198 (9th Cir. 1966).

The relief sought by the plaintiffs in this case would not come through the government action they seek. The price of land is determined by the relationship between the demand for and supply of land in the Imperial Valley. The land market would adjust to a new residency requirement but at levels that cannot be determined with any degree of precision and which may still be higher than plaintiffs can afford. It is indisputable that a wide variety of other government actions can also affect this land market. A change in tax regulations relating to agricultural land or a change in the crop support system for crops grown in the Imperial Valley could just as likely affect the price of agricultural land as an application of the residency requirement. In addition, plaintiffs' inability to afford farming land also stems from their insufficient income. A change in government regulations concerning loans for the purchase of agricultural lands or income support to agricultural workers could increase the plaintiffs' ability to purchase farming land without necessarily reducing the price of land. The injury plaintiffs allege—the inability to purchase farming land at prices they can afford—is neither particularized nor does it flow "concretely and demonstrably" from the government's activities, or lack of activity, challenged in the complaint.

Furthermore, any relief that could appropriately be ordered in this case would not redress plaintiffs' alleged injuries. The most that could be ordered is a discontinuance of deliveries of water to lands owned by nonresidents. Nonresident landowners could not be forced to sell their lands. Some lands owned by nonresidents might be turned to industrial or residential uses. Nonresidents could move back to the area and continue to receive irrigation water for their lands.<sup>11</sup> Land placed for sale by nonresidents could

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<sup>11</sup> The government has contended that residency is not a continuing requirement for the delivery of water. See, e. g., 43 C.F.R. § 230.65. In that case, those nonresidents who were residents when they first began to receive water might be able to continue

be purchased by residents other than the plaintiffs or by nonresidents who wished to move to the area in order to obtain farm land. These two groups of prospective purchasers would compete with plaintiffs for the purchase of available farm lands and drive up prices. Plaintiffs were not required to prove with absolute certainty that this aspect of the test for standing would be satisfied, but after a full trial we are still of the opinion that:

[i]t is a mere speculative possibility that any relief which is appropriate under the statute will bring about the result sought by plaintiffs. . . . [T]he solution to plaintiffs' problem depends upon decisions and actions by third parties who are not before the court and who could not properly be the subject of a decree directing the result sought by plaintiffs.

*Bowker v. Morton, supra*, 541 F.2d at 1350.<sup>12</sup>

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to receive that water even if the residency requirement of Section 5 was enforced. This would add a further factor of uncertainty when considering whether plaintiffs' injuries would be redressed by the order they seek. However, the district court rejected this interpretation of Section 5. Consequently, without expressing any opinion on the correct view of the problem, we do not consider the possibility that residents could continue to receive water for their lands even after they move out of the area when evaluating the standing problem.

<sup>12</sup> This is not a case where remand to the district court for the purpose of making further relevant findings of fact would be appropriate. No individual plaintiff testified at the trial, and there is no other evidence which would support any findings on the desires of any individual plaintiff to purchase any particular farm. In addition, the testimony of the agricultural economist that forms the basis for the district court's finding that enforcement of the residency requirement would bring an "immediate and substantial" decline in land prices cannot support any findings more definite than the one the district court has already made. In fact, that testimony sets forth so many variables that must be considered in conjunction with a theoretical enforcement of the residency requirement that it supports, rather than detracts from, the conclusion that plaintiffs' injuries would not be redressed by the relief requested in this lawsuit. See Reporter's Transcript, pps. 254-277.

The conclusion that plaintiffs lack standing is not changed, as plaintiffs would suggest, by the decision of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). The individual plaintiff in that case alleged more than a desire to live in a certain municipality. Instead, he sought to live in a particular proposed housing development, and he would have qualified to live there had the development been built. The builder of the proposed project was a co-plaintiff, and the challenged action of the municipal government was a direct road-block to the fulfillment of the desires of both plaintiffs. There was no generalized grievance where redress depended on speculation about the activities of third persons not parties in the lawsuit. 429 U.S. at 260-264, 97 S.Ct. 555. The plaintiffs herein, on the other hand, are like the individual plaintiffs who were found to lack standing in *Warth v. Seldin, supra*, 422 U.S. at 502-508, 95 S.Ct. 2197.<sup>13</sup>

B. *United States v. Imperial Irrigation District, No. 71-2124.*

This appeal (hereinafter the "acreage case") comes to us in a different procedural posture from the residency case. Here, the complaint was filed by the government. It

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<sup>13</sup> There is a second, nonconstitutional standing requirement that the interests of the plaintiffs be "arguably within the zone of interests to be protected or regulated" by the statute which plaintiffs seek to enforce. *Data Processing Serv. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1969), cited in *Simon v. Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S. at 39 n.19, 96 S.Ct. 1917, 48 L.Ed.2d 450. Determination of this question would also be relevant to the determination of whether the government has a "duty" to plaintiffs which can be enforced by an action in the nature of mandamus under 28 U.S.C. § 1361. In view of our disposition of this case, there is no need to consider these questions as they arise in the context of this case.

sought a declaration that the excess land provisions of the reclamation laws, particularly Section 46 of the Omnibus Adjustment Act of 1926, applied to privately owned lands in the Imperial Irrigation District that received irrigation water through the All-American Canal. There was no question of the government's standing. This case was not heard by the same judge who made the decisions in the residency case. In an opinion reported at 322 F.Supp. 11 (S.D.Cal.1971), the district court ruled against the government. Judgment was entered, and the government decided not to appeal.

After judgment had been entered and before the time for filing a notice of appeal had run out, a group substantially identical to the plaintiffs in the residency case filed a protective notice of appeal and sought leave to intervene.<sup>14</sup> The district court denied permission to intervene. On appeal, another panel of this Court reversed the district court's order denying permission to intervene, allowed intervention, and validated the protective notice of appeal. That panel further ordered that the appeal in this case be consolidated with the appeals in the residency case.

The unpublished order allowing intervention is attached as an appendix to this opinion. The order emphasized the two conflicting decisions from the district court concerning applicability of the reclamation laws and the responsibility of the court to resolve this problem if such a resolution were "feasible". Of course, that the panel did not have the residency appeal before it and could not anticipate our decision on standing in light of cases, such as *Bowker v. Morton, supra*, which had not been decided when intervention was allowed. Since the district court decision in the residency case must be vacated because of lack of standing on the part of the plaintiffs therein, the basis for the order

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<sup>14</sup> This group had previously been given permission to appear below as *amicus curiae*.

allowing intervention in the acreage case has disappeared.<sup>15</sup>

The Yellen intervenors urge that the order allowing intervention cannot be re-examined because of the "law of the case" doctrine. That doctrine, however, is not to be applied woodenly. An appellate court has the power to reconsider issues that have been previously decided and will do so if such a course is warranted by "considerations of substantial justice." *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659, 662-663 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975). This case does not involve a previous remand to the district court or "panel shopping" by any of the parties. It involves an unpublished interlocutory order allowing an appeal to go forward where the basis of the order has been eliminated by subsequent events.<sup>16</sup> It would be ironic to allow the

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<sup>15</sup> The order allowing intervention also appears to be based on a misunderstanding as to the identity of the various intervenors. The district court allowed various interested Imperial Valley landowners to intervene as defendants early in the proceedings. This Court's earlier order allowing intervention refers to the "interested Imperial Valley landowners" as the group seeking to perfect and prosecute the appeal. In fact, this group had obtained a favorable decision from the district court and opposed the prosecution of an appeal by parties other than the government. It was the Yellen group, a group of non-landowners, who had filed the protective notice of appeal and who sought to prosecute the appeal, and whose intervention request had been denied by the district court.

<sup>16</sup> Under Ninth Circuit Rule 21, the unpublished order allowing intervention is not regarded as precedent but is relevant to the law of the case. Whether it should stand as the law of the case is the very question we determine. The order itself required the appeal to be heard by this panel in conjunction with the appeal in the residency case and thus necessarily contemplated that this panel would dispose of both cases in the appropriate manner. Such a disposition includes a determination of the proper law of the case. Under these circumstances, there is no requirement that reconsideration of the order allowing intervention be done *en banc*. Cf. *Chabot v. National Securities and Research Corporation*, 290 F.2d 657, 659 (2d Cir. 1961).

Yellen intervenors to use an erroneous district court ruling on standing in another case to bootstrap themselves into a position of litigating the important question of the enforcement of the federal reclamation laws in this case. Under these circumstances, it is appropriate to once again examine the request for intervention.

A party seeking to intervene pursuant to Rule 24, Federal Rules of Civil Procedure, need not possess the standing necessary to initiate the lawsuit. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972). Nevertheless, a party possessing the standing to intervene does not automatically have the ability to appeal a decision which all other parties have decided not to appeal. In order to be able to appeal, the intervenor must have an "appealable interest." Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 Harvard Law Rev. 721, 753-754 (1968). Resolution of this question turns on traditional standing analysis. *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1013-1014 (3rd Cir. 1971). Mere interest in the establishment of a legal precedent is not sufficient. *Boston Tow Boat Co. v. United States*, 321 U.S. 632, 64 S.Ct. 776, 88 L.Ed. 975 (1944). With these considerations in mind, we turn to the question of whether the Yellen group had an interest in this litigation that would permit them to intervene for the purpose of taking an appeal from the judgment of the district court.

In support of their motion for permission to intervene, the Yellen group asserted that they resided within the boundaries of the Imperial Irrigation District, that most of them were farm workers, that none owned farm land anywhere in the United States, and that they desired to purchase "excess lands" irrigated with water delivered by the federal reclamation project. These excess lands would be the private lands that would have been sold under the provisions of Section 46 of the Omnibus Adjustment Act

of 1926, 43 U.S.C. § 423e, had the government prevailed in the litigation. They further alleged that they were within the class of beneficiaries of the reclamation laws that were the focus of the lawsuit.<sup>17</sup> Read, as it must be, in the light of the government's complaint, their interest is in the purchase of farm lands at prices to be set in accord with the dictates of Section 46.

This Court has only recently extensively reviewed the purposes behind Section 46. That Section was adopted to achieve broad antimonopoly and antispeculation purposes "conceived by Congress to be of importance to society as a whole." *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1121 (9th Cir. 1976), *cert. denied*, 429 U.S. 1121, 97 S.Ct. 1156, 51 L.Ed.2d 571. We specifically noted also that "Section 46 was intended to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale." *Id.* The history of the reclamation laws confirms that one of their primary purposes was the establishment of a large number of family-size farms. *Id.* at 1119, 1122. See generally, Taylor, *The Excess Land Law: Execution of a Public Policy*, 64 Yale L.J. 477, 481-489 (1961). In this case, the district court found that there were approximately 800 owners of irrigable land in the Imperial Irrigation District whose holdings totalled over 160 acres and that the aggregate land-holdings of this group were approximately 233,000 acres.<sup>18</sup> Sale of any of these holdings in excess of 160 acres in accord with Section 46 would

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<sup>17</sup> They also alleged an interest because of their prosecution of the residency case. In light of our disposition in that action, we do not consider whether this is an interest that would support intervention.

<sup>18</sup> *United States v. Imperial Irrigation District, supra*, 322 F.Supp. at 12.

make family-size farms available for purchase in the Imperial Valley at prices below current market prices.<sup>19</sup>

The injury that the Yellen group is asserting in this case is not merely the high cost of land. More precisely, they assert that in order to buy irrigable farm land in the Imperial Valley they must pay prices higher than they would have to pay if Section 46 applied to the private landowners in the area. The Yellen group suffers from this injury no matter which parcel of land is desired for purchase. The fact that it cannot be specifically measured in dollar amounts at this time does not change the fact that, under the formula established in *United States v. Tulare Lake Canal Co.*, *supra*, the sale price of parcels of irrigable farm land in the Imperial Valley will definitely be reduced if Section 46 were to be applied as the United States originally contended when this action was filed.

This injury stems directly from the lack of recordable contracts required by Section 46. In the absence of a requirement that landowners execute such a contract in order to receive irrigation water, it is inconceivable that any landowner would sell any land at prices substantially below current market prices.

Furthermore, this injury would be redressed by a court order declaring the applicability of Section 46. There would be no need to bring additional parties before the district court before such an order could be issued. Once there was such a court order, redress of the injury would not depend upon the uncertain responses of the large landowners or the land market. While not all landholders might execute the contracts required by Section 46, the vast majority of the land in use in the Imperial Valley Irrigation District is engaged in agricultural production and it would be highly

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<sup>19</sup> For a description of the method for determining the sale price, see *United States v. Tulare Lake Canal Co.*, *supra*, 535 F.2d at 1113 n.74, 1144.

improbable that all of the large holdings of irrigable land would be withdrawn from agricultural use in order to avoid the requirements of Section 46. Once the appraisal process was completed, formerly large agricultural land-holdings would be available in small parcels at prices below the current market price.

It is important to emphasize the difference between the interest and injury involved in this case and the situations in the residency case and the *Bowker* case where the plaintiffs were found to lack standing. In the residency case, the plaintiffs sought a court order that would not, except in a very speculative sense, lead to the availability of farm land at an undefinable price which the plaintiffs could allegedly afford. In contrast, the interest asserted here is much more limited. It is an interest only in reducing land prices, not an interest in reducing land prices to any specific level, and unlike the residency case it is an interest that can be satisfied by an appropriate court order and without the need to depend on the uncertain actions of non-parties to the action and the uncertain responses of the market for agricultural land. In the *Bowker* case, the plaintiffs sought only to force landowners in another area to sell their land at prices determined by the application of Section 46. They did not desire to purchase this land, even if the price were to be reduced, and those plaintiffs were therefore not injured by higher land prices. In contrast, the group attempting to intervene and prosecute the appeal herein desires to take advantage of a certain reduction in land prices and purchase land at those reduced prices.

In its order denying the Yellen group leave to intervene, the district court noted that the potential intervenors had not demonstrated a present ability to purchase the lands they desired. The district court also noted that the requirement for recordable contracts was not inconsistent with the usual right of a seller to choose his purchaser and that

there would quite likely be a large group of people with veteran's preferences for the purchase of excess lands that would have a better chance than the Yellen group to purchase excess lands created by the enforcement of Section 46.<sup>20</sup> However, the standing test of Article III does not require that the Yellen group show with certainty that they will be able to purchase the excess lands should they prevail on the merits of this appeal. The Yellen group occupies a position similar to that of the developer in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, *supra*. The relief sought by the developer would not guarantee that its project would be built, for further problems with financing or construction, unrelated to the subject of the lawsuit, might interfere with its building plans. Such speculation, however, could not diminish from the fact that the relief sought was necessary if construction were to take place and that the developer had the requisite stake in the lawsuit. 45 U.S.L.W. at 4076. Similarly, in this case the likelihood that other factors may interfere with the intervenors' desires to purchase land cannot change the fact that land will never be available at below current market prices unless Section 46 is held to be applicable and that the intervenors thus have the necessary stake in the outcome of the lawsuit to confer standing to prosecute this appeal.<sup>21</sup>

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<sup>20</sup> We express no opinion on the validity of these propositions.

<sup>21</sup> See also *National Association of Neighborhood Health Centers, Inc. v. Mathews*, 179 U.S. App.D.C. 135, 551 F.2d 321 (D.C.Cir.1976). There, an organization of community mental health centers sought to appeal a district court order concerning the transfer of federal funds by certain states from outpatient aid programs to hospital aid programs. Return of the funds to the outpatient aid program would not have meant that the plaintiff organization's members in those states would then have received the funding grants under the outpatient aid program. However, return of the funds would have benefited these members because it would create a larger pool of funds available for

Finally, it must be determined whether the Yellen group has an interest sufficiently within the "zone of interests" protected by Section 46 which is different from the interest of a taxpayer or member of the general public and which satisfies the non-constitutional test for standing of *Data Processing Serv. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1969).<sup>22</sup> From our previous summary of the purposes behind Section 46, derived from *United States v. Tulare Lake Canal Co.*, *supra*, it would appear that a non-landowning resident of an area where agriculture is feasible only because of a federal irrigation project who desires to purchase agricultural land and become a farmer is a particular "beneficiary" of Section 46 distinct from the general public and falls within the statute's "zone of interests."

The Yellen group thus has an interest under Rule 24(a)(2) which it may pursue on appeal.<sup>23</sup> Accordingly, we reaffirm

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outpatient programs. This enhancement of the prospect of funding was held to be "substantial relief" sufficient to establish standing to challenge the district court's order concerning the transfer of funds. *Id.* at 329. Similarly, in this case, the intervenors' opportunity to obtain significantly lower land prices would be substantially enhanced by an appropriate court order. In the residency case, however, our previous discussion has pointed out that there is no substantial certainty that the opportunity of the plaintiffs therein for obtaining the relief sought in that case would be enhanced by an appropriate court order.

<sup>22</sup> See footnotes 9 and 12, *supra*.

<sup>23</sup> The district court discussed other reasons for denying intervention. First, it held that a previous proceeding in the California courts precluded the applicants for intervention from further litigating the acreage limitation question. We consider this problem in Section III, *infra*. The district court also decided that the Yellen group's interest was too speculative and remote to support intervention because its decision on the merits would first have to be reversed on appeal. However, that was the very result that the Yellen group sought. The district court also felt that the necessity for further proceedings to determine the value of lands

the previous order granting intervention and validating the protective notice of appeal, and we proceed to consider the merits of the case.

### III. Res Judicata.

After the United States and the Imperial Irrigation District entered into the contract for the repayment of construction costs for the All-American Canal, the District initiated a confirmation action in the Superior Court of California for Imperial County. This action, entitled *Hewes v. All Persons*, resulted in a 1933 judgment that the land-owners<sup>24</sup> claim is *res judicata* as to the contention that acreage limitations apply to privately owned lands in the Imperial Irrigation District.

In 1933, California law allowed an irrigation district to submit a contract for cooperation with the United States to a superior court for a validation proceeding.<sup>25</sup> Pursuant

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to be disposed and a plan for disposition made the possibility of relief even more remote. The length of time, however, before lands become available does not diminish the interest of the applicants for intervention. Finally, the district court noted that the United States had vigorously represented the interests of the Yellen group throughout the litigation. However, the decision of the government not to appeal meant that those interests were no longer being adequately represented.

<sup>24</sup> Appellees in this case are the Imperial Irrigation District, named as a defendant below, landowners in the District owning more than 160 acres of irrigable land (appearing on behalf of themselves and the class of landowners owning excess lands) who were allowed to intervene by the district court, and the State of California which was also allowed to intervene below. Not all of the appellees have raised the same arguments in support of the judgment but none have taken positions that contradict the arguments of another appellee. The briefs of the landowner intervenors are the most comprehensive. Consequently, for the sake of convenience, all the appellees will be referred to throughout the remainder of this opinion as landowners.

<sup>25</sup> 1897 Cal.Stat. c. 189, p. 276 § 68; 1917 Cal.Stat. c. 160, p. 243 § 3. See Cal.Water Code §§ 22670-22671, 23225.

to Article 31 of its contract with the United States, the District was required to institute a judicial confirmation proceeding, and the *Hewes* action was designed to satisfy that requirement.<sup>26</sup> The validity of the contract was challenged on grounds not relevant here by landowners in the Coachella Valley. At the same time, a landowner in the Imperial Valley named Charles Malan instituted another action entitled *Malan v. Imperial Irrigation District*. The *Malan* action raised a number of objections to the contract. One of those objections was that Malan, as an owner of more than 160 acres, would be deprived of delivery of water for his excess lands by the reclamation law if the contract was confirmed. The District took the position that this objection was meritless as the acreage limitation provisions did not apply under the terms of the Project Act. The District even went so far as to solicit a letter from the Secretary of the Interior to support their position in the *Malan* litigation.<sup>27</sup>

The *Malan* case was considered along with the *Hewes* confirmation proceeding. The superior court found that the contract would not limit the delivery of water to excess lands, concluded that no acreage limitations were made applicable to private lands by the contract and specifically stated that Section 5 of the Reclamation Act of 1902 did not apply in the Imperial Valley.<sup>28</sup> The judgment of the

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<sup>26</sup> No such requirement was contained in the Project Act. The parties dispute whether the requirement was placed in the contract because of provisions for a confirmation proceeding in Section 46, Section 1 of the Act of May 15, 1922, 43 U.S.C. § 511, or merely because of California law. We deem it unnecessary to decide the source of authority for the contract provision for a judicial confirmation proceeding. The relevant issue is the *res judicata* effect to be given a judgment actually rendered by a California court in a confirmation proceeding.

<sup>27</sup> See part VI of this opinion.

<sup>28</sup> Although partially denominated a finding of fact, it is clear that all of the essentials of the decision on the acreage limitation issue were legal conclusions.

superior court became final in 1934 when appeals from that judgment to the California Supreme Court were dismissed by the parties.<sup>29</sup>

The United States was not a party in the *Hewes* and *Malan* actions, and the landowners did not raise a *res judicata* defense against the United States in the district court proceedings in the present case. The intervenors claim that such a defense cannot be raised against the United States and therefore cannot be raised against them because they are only asserting claims originally raised by the government. However, as discussed previously, the interests of an intervenor appealing a judgment are not necessarily identical with the interests of a non-appealing party which originally instituted the action. The intervenors' interests in this case are their own private interests and not the public interests represented by the government. Accordingly, we must determine whether the intervenors are barred by *res judicata* from litigating the acreage limitation question.

Under California law, a confirmation proceeding involving an irrigation district contract with the United States is considered an *in rem* proceeding. It is brought against all persons claiming an interest in the formation of the irrigation district, the operation of the contract, and the lands affected by the contract. A final judgment in a con-

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<sup>29</sup> While the appeal was pending, the Bureau of Reclamation sent a letter to the Coachella Valley water district to the effect that unless it dismissed its appeal, the Bureau would make plans for the All-American Canal that would not include a capacity to deliver water to the Coachella Valley. While the reasons for the dismissal of the Coachella appeal are not in the record, it should be noted that shortly thereafter the Coachella appeal was in fact dismissed and a separate contract for the Coachella Valley was negotiated with the United States. The record also includes a letter from Malan's attorney complaining about pressure to drop the appeal, but the record does not contain anything to explain why Malan's appeal was dismissed.

fирмation proceeding "will foreclose further inquiry into the matters to which the judgment properly relates. Within its pertinent issues it will be binding on the world at large." *Ivanhoe Irrigation District v. All Parties & Persons*, 47 Cal.2d 597, 606, 306 P.2d 824, 829 (1957), *reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958). Phrased another way, "[w]ithin its legitimate issues it will be binding on the world at large." *Santa Barbara County Water Agency v. All Persons & Parties*, 47 Cal.2d 699, 703, 306 P.3d 875, 878 (1957), *reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken, supra*.

It therefore becomes necessary to determine what the "pertinent" or "legitimate" issues are in a confirmation proceeding, because the California courts will recognize the confirmation proceeding judgment as *res judicata* only as to those issues to which the judgment "properly relates". This question was answered in the *Ivanhoe* proceedings in opinions of the California Supreme Court both before and after the Supreme Court decision on other aspects of the case. "The judgment [in a confirmation proceeding] is limited to a determination of the validity of the contract." *Ivanhoe Irrigation District v. All Parties and Persons, supra*, 47 Cal.2d at 607, 306 P.2d at 829, such a judgment determines questions necessarily incident to such a determination. *Id.* However, "the only issue involved is the validity of the contract." *Ivanhoe Irrigation District v. All Parties and Persons*, 53 Cal.2d 692, 699, 3 Cal.Rptr. 317, 320, 350 P.2d 69, 72 (1960) (Emphasis supplied.)

For purposes of this case, therefore, we start with the proposition that the *Hewes* judgment establishes the validity of the contract. That portion of the *Hewes* decision dealing with the acreage limitations of the reclamation law, however, is not essential to a determination that the contract was valid. A decision that the Project Act incorporates the acreage limitations on private lands of the

reclamation law into the contract would not make the contract invalid under federal law, *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958), or California law. *Ivanhoe Irrigation District v. All Parties and Persons*, 53 Cal.2d 692, 3 Cal.Rptr. 317, 350 P.2d 69 (1960).<sup>30</sup> A decision that the Project Act does not incorporate the acreage limitations is a decision that Congress exempted the project from application of those limitations and would not make the contract invalid under federal or California law. The decision that acreage limitations did not apply under the contract was therefore irrelevant to the only question properly before the court in the confirmation proceeding—the validity of the contract—and it is pure dicta. Cf. *Stanson v. Mott*, 17 Cal.3d 206, 212, 130 Cal.Rptr. 697, 701, 551 P.2d 1 (1976).

The federal courts are bound to give the *Hewes* judgment the "same full faith and credit" it would be given by the courts of California. *Neale v. Goldberg*, 525 F.2d 332 (9th Cir. 1975). The determination of the *Hewes* court that acreage limitations did not apply in the Imperial Irrigation District was not a determination which is "properly related" to the purpose of the confirmation proceeding because decision of that issue one way or another cannot affect the validity of the contract under federal or California law. The determination of the acreage limitation issue by the *Hewes* court was an interpretation of the terms of the contract that the court was not entitled to make in a confirmation proceeding. Cf. *Ivanhoe Irrigation District v. All Parties and Persons*, *supra*, 53 Cal.2d at 727-728, 3 Cal.Rptr. at 338, 350 P.2d at 90. While the acreage limitation was litigated in the confirmation proceeding, that issue was inci-

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<sup>30</sup> While this case interpreted Cal. Water Code §§ 23197, 23200, which were enacted in 1943, those statutes are essentially the same as earlier California statutes to the same effect that were applicable when the Imperial Irrigation District contract was made. See 1917 Cal.Stat. c. 160, pps. 244, 245, §§ 2, 4.

dental and collateral to the judgment rendered therein. The judgment in the confirmation proceeding cannot foreclose consideration of the acreage limitation issue in the present case. *Memorex Corp. v. International Business Machines Corp.*, 555 F.2d 1379, 1898 (9th Cir. 1977).<sup>31</sup>

#### IV. Statutory Construction.

The enactment of the Boulder Canyon Project Act was not due solely to the problems of the Imperial Valley. A canal to the Valley running entirely within the United States had been desired for many years, and the District, unable to construct the necessary facilities with its own resources, had turned to Congress for assistance. In addition, however, the Project Act was the outgrowth of extensive concerns of the seven Colorado River Basin states over allocation of river water on an equitable basis, the control of flooding, and the more productive use of the water. Moreover, international considerations were involved because of Mexico's interest in the Colorado River. The history of the Project Act summarized in *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), need not be repeated here. See also *Arizona Power Authority v. Morton*, 549 F.2d 1231, 1233-1234 (9th Cir. 1977). For present purposes, it is sufficient to say that Congress recognized that the problems could not be handled on a local or even state-by-state basis, and that the matter had become a pressing national concern.

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<sup>31</sup> We therefore need not determine whether intervenors were interested parties in the *Hewes* litigation such that they were bound by the determination of the acreage limitation issue when neither of the parties litigating that issue wished to see the acreage limitations apply in the Imperial Valley, *Aerojet-General Corporation v. Askew*, 511 F.2d 710, 720-721 (5th Cir. 1975), *reh. den.*, 514 F.2d 1072 (1975), or whether important policy considerations mandate the inapplicability of *res judicata* principles in litigation of the acreage limitation question.

At the same time as the concerns and proposals culminating in the passage of the Project Act had been occupying the attention of Congress, various revisions of the general reclamation laws, culminating in Section 46 of the Omnibus Adjustment Act of 1926, had been enacted into law. Section 12 of the Project Act defined the term "reclamation law" to include the Reclamation Act of 1902 "and the Acts amendatory thereof and supplemental thereto," 43 U.S.C. § 617k, and Section 46 would be included in that definition. Section 14 of the Project Act stated that the Act was a "supplement" to the reclamation law. 43 U.S.C. § 617m. By the operation of Sections 12 and 14, the Project Act was incorporated into the framework of the reclamation laws, including Section 46, that had recently been considered by Congress and that had also been the subject of national concern for some time.

Section 1 of the Project Act, 43 U.S.C. § 617, authorizes construction of "a main canal and appurtenant structures located entirely within the United States" to deliver water from the Colorado River to the Imperial and Coachella Valleys. While providing that there be no charge for the water or the "use, storage, or delivery" of the water, Section 1 requires that expenditures by the United States for the "main canal and appurtenant structures" be reimbursable "as provided in the reclamation law." Section 4(b) of the Project Act, 43 U.S.C. § 617c(b), mandates that reimbursement be secured by the Secretary of the Interior:

by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

Section 14 of the Project Act reinforces the command of Section 4(b) by providing that the "reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C. § 617m. The Project Act thus explic-

itly calls for the reclamation law to govern contracts for payment to the United States for the "construction, operation, and maintenance" of the All-American Canal.

The Project Act was approved December 21, 1928, and it became effective on June 25, 1929. At that time, the portion of the reclamation law governing contracts for payment of the costs of "constructing, operating, and maintaining" works on new reclamation projects was Section 46. Section 46 requires that such contracts provide that private lands in excess of 160 acres should not receive water from the reclamation project unless the owners agree to sell their excess lands according to the scheme set out in Section 46. By direct scrutiny of the statutory language, it is apparent that the acreage limitations of Section 46 apply to private lands in the Imperial Irrigation District that receive irrigation water from the All-American Canal.

The excess land provisions are an important cornerstone of the reclamation laws.<sup>32</sup> Congress has exempted some projects from the operation of these provisions, but "the Congress has always made such exemption by express enactment." *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 292, 78 S.Ct. 1174, 1184, 2 L.Ed.2d 1313 (1958).<sup>33</sup> In the face of language directly mandating application of the excess lands provision of Section 46 to private lands in the Imperial Irrigation District, and in the absence of any language in the Project Act that is comparable to the example of a specific exemption used by the Supreme

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<sup>32</sup> One treatise has commented that "[a]creage limitation is, in every respect, the most important part of reclamation law." 2 *Waters and Water Rights*, § 120 at p. 209 (1967).

<sup>33</sup> Although referring to Section 5 of the Reclamation Act of 1902, this statement applies equally well to the excess land provision of Section 46 of the Omnibus Adjustment Act of 1926. The very example of a specific exemption used by the Supreme Court in fact referred specifically only to Section 46. See 68 Stat. 1190.

Court in the *Ivanhoe* case, the landowners nevertheless argue that various portions of the Project Act necessarily operate to create such an exemption. It is to these contentions that we now turn.

Under the Boulder Canyon Project Act, the Secretary of Interior has broad powers to allocate the waters of the Colorado River among the "Lower Basin" states of California, Nevada, and Arizona, and to determine which users within these states will receive water. The Secretary's authority to carry out these allocations is exercised through contracts made pursuant to Section 5 of the Project Act, 43 U.S.C. § 617d. *Arizona v. California, supra*, 373 U.S. at 580, 83 S.Ct. at 1487. One of the most significant limitations on this allocation power is that the Secretary is "required" by Section 6 of the Project Act to satisfy "present perfected rights in pursuance of Article VIII of said Colorado River Compact." *Id.* at 584, 83 S.Ct. at 1489; 43 U.S.C. § 617e. Article VIII of the Colorado River Compact provides that "[p]resent perfected rights to the beneficial use of water of the Colorado River System are unimpaired by this Compact."<sup>34</sup> The term "present perfected rights" from the Colorado River Compact is thus incorporated into and made applicable to allocation of water under the Project Act. *Arizona v. California, supra*, 373 U.S. at 566, 83 S.Ct. 1468.<sup>35</sup>

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<sup>34</sup> Section VIII of the Colorado River Compact also provides that the rights attached when storage of water reached a certain level. The text of the Compact can be found at 70 Cong.Rec. 324 (1928).

<sup>35</sup> The landowners also claim that Sections 8 and 13(c) of the Project Act make the Colorado River Compact applicable to the Act. However, the references to the Colorado River Compact in Sections 8 and 13(c) were used only to show that the Project Act did not change the Compact's division of water between the Upper and Lower Basins. *Arizona v. California, supra*, 373 U.S. at 566, 83 S.Ct. at 1480.

The Secretary's contractual powers under Section 5 of the Project Act are also limited by Section 14 of that Act which provides that "[t]his subchapter shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." 43 U.S.C. § 617m. It is the landowners' position that the qualifying clause of Section 14, "except as otherwise herein provided", subordinates Section 14 to other specific provisions in the Project Act that conflict with the reclamation laws. They further contend that Section 6 of the Act, in providing for the satisfaction of present perfected rights, necessarily conflicts with the application of excess land provisions of Section 46 and renders the latter provisions inapplicable in the Imperial Irrigation District.<sup>36</sup>

A "present perfected right" is a "water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works" as of June 25, 1929, the effective date of the Project Act. *Arizona v. California*, 376 U.S. 340, 341, 84 S.Ct. 755, 756, 11 L.Ed.2d 757 (1964).<sup>37</sup>

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<sup>36</sup> This argument overlooks the possibility that the Secretary may determine to allocate to the Imperial Irrigation District more water than the amount ultimately determined to be the District's present perfected rights. Water in excess of the District's present perfected rights would not be the subject of Section 6 of the Project Act and would not be protected by that Section from the operation of Section 46.

<sup>37</sup> As is clear from the discussion of Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, and Section 18 of the Project Act in *Arizona v. California*, *supra*, 373 U.S. at 586-587, 83 S.Ct. 1468, not all rights to water under state law control the Secretary's decisions. "Present perfected rights" are thus not the equivalent of all forms of vested rights under state law.

In the case of the Imperial Valley, it therefore becomes necessary to determine the nature of the ownership of water rights under California law.<sup>38</sup> Examination of California law on this point leads to the conclusion that the landowners' argument must be rejected and that satisfaction of present perfected rights is not incompatible with the application of the excess lands provision of Section 46.

No individual landowner in the Imperial Valley has filed a claim to water from the Colorado River under the terms of the Supreme Court's decree in *Arizona v. California, supra*, 376 U.S. at 351-352, 83 S.Ct. 1468, and there are no records of individual claims by Imperial Valley landowners for water rights as of June 25, 1929. Under California law, the Imperial Irrigation District holds legal title to the rights to Colorado River water in trust for the landowners. *Merchants National Bank of San Diego v. Escondido Irrigation District*, 144 Cal. 329, 334, 77 P. 937, 939 (1904).<sup>39</sup> The water rights themselves are not held in trust for any individual landowner. The equitable ownership of the water rights is held in common by all the landowners in the District, *Id.* These principles of ownership have been specifically applied to the Imperial Irrigation District.

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<sup>38</sup> It had been stipulated below by the government that the Imperial Irrigation District possessed present perfected rights, and we see no reason at this point to disturb this stipulation. While the exact quantity of these present perfected rights has not yet been determined, such an exact accounting is not necessary to this argument of the landowners. But, see footnote 36, *supra*.

<sup>39</sup> Three individuals filed notices of appropriation for the right to divert water for use in the Imperial Valley from the Colorado River between 1895 and 1899. Those notices were assigned to the California Development Company on the date they were recorded. The Imperial Irrigation District subsequently acquired all the assets of the California Development Company except for the latter's agricultural lands in Mexico.

*Hall v. Superior Court*, 198 Cal. 373, 383, 245 P. 814, 818 (1926).

The concept of an irrigation district's ownership of water rights in trust for the common benefit of landowners within the district is derived from the California doctrine that the use of appropriated water is a public use. Thus, the users of water, the rights to which are held by an irrigation district in trust for the common benefit, do not possess rights to the water that can be considered private property in the ordinary sense of the words, nor do the lands irrigated by that water thereby obtain any absolute right to the continued delivery of water. Landowners within an irrigation district do not possess as part of their freehold estates a proportionate ownership in the water rights owned by the irrigation district. The right of any individual landowner to the use of water, which must be a public use, comes about by reason of the landowner's status as a member of the class for whose benefit the water has been appropriated. *Madera Irrigation District v. All Persons*, 47 Cal.2d 681, 691-693, 306 P.2d 886, 892-893 (1957), *reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken, supra; Jenison v. Redfield*, 149 Cal. 500, 87 P. 62 (1906).

A consequence of this rule is that no particular landowner or particular piece of land is entitled to use any particular proportion of the water to which the irrigation district owns rights. As new landowners and as new lands come within the jurisdiction of the irrigation district, they are entitled to use their proper share of the water, and the shares of all landowners would have to be redistributed. *Madera Irrigation District v. All Persons, supra*, 47 Cal.2d at 692, 306 P.2d at 893.

It follows that all the present perfected rights owned by the Imperial Irrigation District as of June 25, 1929, are not water rights owned by any particular landowner. Satisfaction of the Imperial Irrigation District's present per-

fected rights by the Secretary of the Interior in the allocation of Colorado River water therefore only concerns the total quantity of water to be supplied to the Imperial Irrigation District and does not concern supplying any particular amount of water due to any particular landowner. The excess land provisions of Section 46, however, apply only to individual landowners and do not, under the Project Act, apply to the Imperial Irrigation District as the owner of water rights in trust for the common benefit. Excess lands of a particular landowner could be deprived of water without reducing the total amount of water delivered to the Imperial Irrigation District. The District would have to redistribute its deliveries if certain lands became ineligible for delivery of water, but the satisfaction of the District's total present perfected rights would not be impaired by the operation of Section 46. Furthermore, redistribution of deliveries in accord with the excess lands provisions of Section 46 would not violate the trust under which the Imperial Irrigation District owns the water rights for the common benefit. *Ivanhoe Irrigation District v. All Parties and Persons*, 53 Cal.2d 692, 712, 3 Cal.Rptr. 317, 329, 350 P.2d 69, 81 (1960). Section 6 of the Boulder Canyon Project Act, therefore, does not preclude application of the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926.

The landowners next argue that the overall scheme of the Boulder Canyon Project Act is inconsistent with Section 46.<sup>40</sup> They point out that Section 46 combines a variety of provisions while the Project Act is composed of different sections dealing separately with different subjects. In itself, this hardly makes the two statutes incompatible. Section 4(b) of the Project Act, 43 U.S.C. § 617c(b), required the Secretary of the Interior to make provisions

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<sup>40</sup> This argument would apply to all water deliveries through the All-American Canal, including delivery to the Coachella Valley. Cf. footnote 36, *supra*.

for reimbursement revenues before money was appropriated or construction began on the Canal, while Section 46 permits execution of a repayment contract upon completion of the project but before commencement of water deliveries. In this respect, the Project Act's modification of Section 46 deals only with the time for securing repayment and does not mean that all other substantive provisions of Section 46 are incompatible with the Project Act.<sup>41</sup>

The landowners point out that Sections 1 and 4(b) of the Project Act require reimbursement only for the capital costs of the "main canal and appurtenant structures to connect the Laguna Dam" while exempting users in the Imperial Valley from repayment obligations for the costs of water storage facilities. 43 U.S.C. §§ 617, 617c(b). Nevertheless, the Project Act still required reimbursement of substantial sums of money. This partial relaxation of Section 46's requirement of reimbursement of the capital costs of all project works does not make the other provisions of Section 46 inapplicable. The landowners also note that Section 46 requires a contract while Section 4(b) of the Project Act requires the Secretary to insure repayment "by contract or otherwise." Whatever might be the case if the Secretary had "otherwise" insured repayment, the method chosen in the case of the Imperial Valley was a contract.<sup>42</sup>

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<sup>41</sup> Similarly, we attach no significance in this context to the fact that Section 2(a) of the Project Act, 43 U.S.C. § 617a(a), establishes a special fund, the Colorado River Dam Fund, that is not envisioned by Section 46 and that is to receive all payments made for projects constructed pursuant to the Act.

<sup>42</sup> The landowners fail to note that if the Secretary "otherwise" insures repayment, Section 4(b) still requires that it be done "in the manner provided in the reclamation law" and that at the time the contract was made there was no means authorized by the reclamation law, other than the type of contract involved here, for insuring repayment.

The landowners further argue that Section 5 of the Project Act, 43 U.S.C. § 617d, prescribes conditions to govern water delivery contracts and that this Section requires the contracts to conform to Section 4(a) of the Project Act, 43 U.S.C. § 617c(a). They then argue that Section 4(a) contemplates the unconditional delivery of water to satisfy present perfected rights and says nothing about conforming to the reclamation laws. Sections 1 and 4(b) of the Project Act, they argue, contain references to reimbursement "as provided in reclamation law", but the landowners argue that these provisions are distinct from the provisions governing the delivery of water in Sections 4(a) and 5. They argue that it would be logical to place a condition that the delivery of water be subject to the reclamation laws in the section of the Project Act specifically governing such deliveries and that the failure to place such a condition in that section (and specifically placing such a condition in another section of the Project Act) means that there is no such condition on deliveries under Section 5.

This argument overlooks the fact Section 4(a) deals with interstate allocations of water and that conditions on the Secretary's authority under Section 5 are also contained in other sections of the Project Act. For example, Section 6, as previously urged by the landowners, is a significant limitation upon the authority conferred by Section 5. Similarly, as discussed previously, Section 14 is also a significant limitation. The Section 4(a) limitation specifically incorporated into Section 5 is no stronger than the Section 6 limitation that is not specifically referred to in Section 5, and, as held earlier, the Section 6 limitation is not incompatible with the application of the excess lands provision of Section 46.

The landowners' next argue that Section 14 of the Project Act applies, by its terms, only to the "construction, operation, and management" of project works and not to the delivery of water. They claim that these terms refer

only to the business and fiscal aspects of the project and not to matters of "social control" such as acreage limitations. They claim their argument is bolstered by the fact that the Project Act employs language in other sections that distinguishes between "construction, operation, and maintenance" and "delivery" of water.<sup>43</sup> This argument overlooks the fact that the contracts with irrigation districts required by Section 46 are themselves only for the reimbursement of the "cost of constructing, operating, and maintaining the works during the time they are in control of the United States" and that the Section 46 contracts with the irrigation districts are not for delivery of water. The requirement that excess lands shall not receive water is a condition, basic to achieving a central purpose of the reclamation laws, to be incorporated into a Section 46 contract with an irrigation district for "construction, operation, and maintenance" of a project. Under the Project Act, Imperial Valley landowners were only required to reimburse the United States for the "construction, operation, and management" expenses connected with the All-American Canal. They were not to be charged for any portion of the construction of Boulder Dam (the main storage dam) or for the use or delivery of the water. It was natural, therefore to have separate provisions dealing with the delivery of water, where no reimbursement was required, and with the construction of the Canal where reimbursement was required. With regard to the latter, as has previously been discussed, not only Section 14 but Sections 1 and 4(b) of the Project Act mandate application of Section 46 to reimbursement contracts. In this context,

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<sup>43</sup> Compare Section 10, 43 U.S.C. § 617i, with Section 5, 43 U.S.C. § 617d, and Section 1, 43 U.S.C. § 617, with Section 4(b), 43 U.S.C. § 617c(b). See also Section 7, 43 U.S.C. § 617f. However, Section 8(b), 43 U.S.C. § 617g(b), appears to include delivery and use of water within the activities of construction, operation, and management. This argument would apply to all water deliveries through the All-American Canal. See footnotes 36, 40, *supra*.

any differentiation in Project Act provisions for delivery of water and construction of the Canal is nothing more than a reflection of the fact that the Imperial Valley did not have to fully repay the United States for the benefits received under the Act but that repayment contracts for the benefits that did have to be reimbursed still had to be in accord with the reclamation law and Section 46.

The final statutory construction argument asserted by the landowners is based on Section 9 of the Project Act which provides for the disposition of public lands that could be practically irrigated and reclaimed by the project works authorized by the Act. 43 U.S.C. § 617h. This Section directed the Secretary to withdraw these public lands from entry and authorized re-opening them to entry at a later date. Lands subsequently opened for entry were to be in tracts in various sizes to be determined by the Secretary, with no tract larger than 160 acres. Section 9 also granted an exclusive entry preference to veterans for a period of three months, subject to the qualifications requirements of 43 U.S.C. § 433. The landowners argue that references in Section 9 to other statutes would not have been necessary if Section 14 of the Project Act generally incorporated the reclamation laws into the Act. They then argue that the specific references to other statutes in the Section of the Project Act dealing with public lands and the absence of any specific provisions dealing with excess private lands means that the excess lands provisions of Section 46 cannot apply to private lands benefiting from the Act.

The landowners are reading too much significance into Section 9's references to other statutes. The reference to a 160-acre limit on tracts of public land merely limits the Secretary of the Interior's discretion in determining tract sizes. Otherwise, Section 9 requires the opening of public lands for entry "in accordance with the provisions of the reclamation law"—a general reference to reclamation law

similar to the general reference in Section 14. Similarly, the exclusive preference given to veterans by Section 9 has no counterpart in the general homestead laws, as incorporated into the reclamation law by 43 U.S.C. § 432,<sup>44</sup> so this preference had to be qualified by a specific reference to 43 U.S.C. § 433. To use these two minor qualifications by reference in Section 9 to create an exemption for private lands from the excess land laws in face of the strong national policy of generally enforcing those laws, the specific incorporation of reclamation law in Section 14 of the Act, and the lack of any specific exemption from the operation of the excess land laws in the Project Act puts a far too strained reading on Section 9 which cannot be accepted.

#### V. Legislative History.

A series of bills introduced by Congressman Swing and Senator Johnson (both of California) in the 67th, 68th, 69th, and 70th Congresses, and known as the Swing-Johnson bills, culminated in the passage of the Project Act by the 70th Congress in December of 1928. The bills generated a great deal of controversy, especially because of the opposition of Arizona's Congressional delegation. However, despite hearings by committees of both the House and Senate considering each series of Swing-Johnson bills and extensive debates on the fourth and last Swing-Johnson measure that ultimately became the Project Act, the legislative history concerning the acreage limitation provisions of the reclamation laws is relatively meager. In reviewing this history, it is important to remember that

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<sup>44</sup> The time limit on preferences when the Project Act was passed was, in the discretion of the Secretary of the Interior, 90 days or more. See 42 Stat. 358 (January 21, 1922), later codified without relevant change as 43 U.S.C. § 186. Section 9 of the Project Act limits the preference period to exactly three months. (Except for lands in Alaska, the homestead laws were repealed effective October 21, 1976, by Public Law 94-579, Title VII, § 702, 90 Stat. 2787.)

the landowners seek to find in it a specific exemption that cannot be found in the actual language of the Project Act.

The relevant legislative history begins with the third series of Swing-Johnson bills introduced during the 69th Congress.<sup>45</sup> A bill introduced by Congressman Swing, H.R. 6251, was referred to the Department of the Interior, re-drafted, and re-introduced as H.R. 9826. As re-drafted, H.R. 9826 contained a provision identical to that eventually enacted as Section 14 of the Project Act.

During hearings on that bill, Congressman Swing informed a House committee that, in his opinion, the bill did not require a private landowner to sell lands in excess of 160 acres at prices to be fixed by the Secretary of the Interior. This statement was not made with reference to any particular portion of the bill. It was accompanied by Congressman Swing's misleading testimony that there were only one or two large landholdings in the Imperial Valley.<sup>46</sup> At the same time, the Commissioner of the Bureau of Reclamation told the committee that the bill permitted landowners to retain their farms intact no matter how large their holdings. However, he added that "old" lands, i.e., lands presently irrigated without the benefit of a federal reclamation project, would be sold water under a Warren contract.<sup>47</sup>

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<sup>45</sup> The landowners rely on a brief exchange during committee hearings in 1924 on the second Swing-Johnson bill. However, this bill was never reported out of committee.

<sup>46</sup> While the average size of an Imperial Valley farm in the 1920s may have been less than 160 acres, there were several over 320 acres. Taylor, *Water, Land, and Environment, etc.* 13 Natural Resources Journal 1, 4 (1963).

<sup>47</sup> Hearings on H.R. 6251 and H.R. 9826, 69th Cong., 1st Sess. (1926) at pp. 32-33. It should be noted that the Commissioner also testified that there were several large landholdings in the Imperial Valley.

The Commissioner was referring to the Warren Act, 43 U.S.C. §§ 523-525.<sup>48</sup> Under that Act, water stored by a federal reclamation project in excess of the needs of that project could be delivered by contract to an irrigation district. However, that water could not be used "otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects." 43 U.S.C. § 523. Furthermore, the Warren Act, while not including a divestiture provision such as the one in Section 46, does provide that landowners cannot receive water in excess of an amount sufficient to irrigate 160 acres. 43 U.S.C. § 524.

The committee was thus being told by the government agency responsible for drafting H.R. 9826 that there was no applicable divestiture provision for excess lands but that the general language incorporating the reclamation law incorporated the Warren Act which did limit the amount of water a landowner could receive.<sup>49</sup> It is significant that these hearings were held in February and March of 1926 while Section 46 was not enacted into law until May of 1926.

After completion of the House hearings, the committee amended H.R. 9826 by adding a specific acreage limitation provision similar to the divestiture provision of Section 46. There is no contemporaneous explanation of the committee's reasons for adding this provision. However, in light of the view presented to the committee that the project to build the All-American Canal was viewed as a "supplemental" one subject only to the restrictions in the Warren Act, the amendment can most reasonably be construed as a decision to add an additional restriction to those already

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<sup>48</sup> Congressman Swing's testimony is not inconsistent with that of the Commissioner because the Congressman discussed only divestiture of excess acreage.

<sup>49</sup> Act of February 21, 1911, ch. 141, 36 Stat. 925.

contained in the Warren Act. The bill was reported favorably to the House, but it never came up for a vote.

Meanwhile, a bill sponsored by Senator Johnson, S. 3331, was favorably reported out of committee. Although the committee report did not specifically discuss the acreage limitation question, it did note that a provision in the bill essentially the same as what eventually became Section 14 of the Project Act, made the reclamation law applicable where not inconsistent with other portions of the statute. The report noted that "[i]n a great project as this many details may properly be referable to a general law such as the reclamation act."<sup>50</sup> During the Senate debates on the bill, Senator Johnson emphasized that the bill was to be part of the reclamation law.<sup>51</sup> Although made in the context of assuring Arizona's senators that Arizona's water rights would be protected, it could hardly have escaped the attention of the Senate that by that time the reclamation law also required significant acreage limitations in its provisions for contracts with irrigation districts. Shortly thereafter, Senator Phipps of Colorado introduced an amendment to S. 3331 and a new bill as a substitute to S. 3331. Both proposals included provisions specifically incorporating acreage limitation provisions similar to Section 46 into the bill's provisions for delivery of water. Neither Senator Phipps' proposals nor S. 3331 were ever the subject of a vote in the Senate.

During the 70th Congress, Congressman Swing and Senator Johnson renewed their efforts. A House bill, H.R. 5773, containing the specific acreage limitation provision previously added by the House committee to H.R. 9826 in the 69th Congress was passed and sent to the Senate. In the meantime, a Senate bill, S. 728, sponsored by Senator

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<sup>50</sup> Senate Report No. 654, 69th Cong., 1st Sess. (1926) at p. 28.

<sup>51</sup> 68 Cong. Rec. 4291-4292 (February 21, 1927).

Johnson, was being considered by the Senate. It contained a provision identical to Section 14 of the Project Act but did not contain the specific acreage limitation provision found in H.R. 5773. While the Senate version was ultimately adopted, the circumstances surrounding the decision to accept the Senate version do not give rise to a conclusion that the Project Act specifically exempts the Imperial Valley from the application of the acreage limitation provisions of the reclamation law.

Senator Johnson's proposal, S. 728, was considered in committee along with S. 1274, a bill proposed by Senator Phipps. The Phipps bill included an express requirement that acreage limitation provisions be incorporated in water delivery contracts while the Johnson bill contained only the general reference to reclamation law eventually enacted as Section 14 of the Project Act. The Johnson bill was reported to the Senate, but the committee did not report the Phipps bill. The Secretary of the Interior objected to the Phipps bill because of its failure to adequately provide for the development of hydroelectric power, and his objections were incorporated into the report on Senator Johnson's bill. In addition, the Secretary's opinion that the Johnson bill, containing no specific acreage limitation provision, was similar to H.R. 5773, which did contain such a specific provision, was also incorporated into the Senate report on the Johnson bill.<sup>52</sup>

When S. 728 reached the floor of the Senate, it was the subject of a lengthy filibuster. During the course of the debates, Senator Hayden of Arizona, one of the bill's most

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<sup>52</sup> Senate report No. 592, 70th Cong., 1st Sess. (1928) at pps. 30-31. Nevertheless, Senator Ashurst of Arizona attached a minority report that alleged, *inter alia*, that the committee had not included his proposed amendment to the bill that would have added a specific acreage limitation provision. *Id. Minority Views* at p. 26. This problem receives only two brief references in a minority report of some 38 pages.

ardent opponents, claimed that the bill failed to provide acreage limitations on privately owned lands receiving irrigation water as the House bill did and proposed an amendment that would contain a specific provision comparable to the one in the House bill.<sup>53</sup> This was one of many amendments sponsored by the two senators from Arizona. There was no discussion of the amendment and the Senate never voted on it. The first session of the 70th Congress adjourned in May of 1928 without the Senate ever voting on Senator Johnson's bill.

When the second session of the 70th Congress began in December of 1928, Senator Johnson immediately moved to substitute H.R. 5773, already passed by the House, for S. 728 and then amend H.R. 5773 by retaining only the enacting clause and substituting S. 728 for the body of the bill. Senator Johnson assured the Senate that he wished only to "preserve orderly legislative procedure" and that the two bills contained "like purposes" and "like designs."<sup>54</sup> The Senate unanimously consented to his request. Senator Hayden then made a speech and engaged in an extended colloquy with Senator Johnson and others over what Senator Hayden considered the significant differences between the bill passed by the House and the Senate version which had been substituted for the House bill. It is noteworthy that at this time Senator Hayden never mentioned the absence of a specific acreage limitation provision as being a significant difference between the Senate and House bills.<sup>55</sup>

During the entire debate in the Senate's second session extending from December 5, 1928, until the Senate passed

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<sup>53</sup> 69 Cong. Rec. 7634-7635 (May 2, 1928). See also 69 Cong. Rec. 9451 (May 22, 1928).

<sup>54</sup> 70 Cong. Rec. 67 (December 5, 1928).

<sup>55</sup> 70 Cong. Rec. 71-81 (December 5, 1928).

the bill on December 14, 1928, the acreage limitation issue was mentioned only once. Senator Ashurst complained that the bill allowed irrigation water to be delivered to landholdings in excess of 160 acres.<sup>56</sup> However, he made only a brief passing reference to the issue in a speech opposing the bill that extends over some 32 pages in the Congressional Record.<sup>57</sup> During the Senate debates in December of 1928, several amendments to the bill were brought up for a vote, but there were no votes on amendments that would have added more specific acreage limitation provisions to the bill.<sup>58</sup> Allocation of water from the Colorado River and control of hydroelectric power facilities were the predominant concerns of the bill's opponents. When the House considered the Senate bill and concurred in it on December 18, 1928, there was again no mention of the acreage limitation issue or the deletion of the specific acreage limitation by the Senate.

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<sup>56</sup> 70 Cong. Rec. 289 (December 8, 1928).

<sup>57</sup> 70 Cong. Rec. 277-298, 314-323 (December 8 and 10, 1928).

<sup>58</sup> The landowners emphasize the origin of Sections 4 and 5 of the Project Act, claiming Congress chose to have Section 5 contracts for the delivery of water be governed by Section 4(a) rather than by a general reference to the reclamation law. In addition, they point out that an amendment to Section 4(b) proposed by Senator Pittman was modified because of Senator Johnson's objections. The modification eliminated requiring delivery of project water in accord with the reclamation laws. See 70 Cong. Rec. 526, 577 (December 13 and 14, 1928). However, the effect of the Pittman amendment was to require the All-American Canal to be paid for under the terms of the reclamation law but without charging for the storage and delivery of the water. See 70 Cong. Rec. 576 (December 14, 1928). The end result was to adopt a provision similar to the proposal of Senator Ashurst cited on page 102 of the Landowners' Joint Consolidated Brief. In any event, as previously discussed, there is no incompatibility between Sections 4 and 5 of the Project Act and the application of Section 46.

Evaluation of this legislative history does not lead us to conclude that Congress intended to exempt lands receiving water carried by the All-American Canal from the acreage limitations of Section 46. On the contrary, the legislative history indicates that the problem did not receive the extended Congressional consideration that would be normally thought appropriate if an exemption to an important part of the reclamation law was being created. Furthermore, the legislative history can be interpreted as giving a positive indication that Congress intended that acreage limitation provisions be incorporated by the general references to reclamation law that were included in the Project Act. A specific acreage limitation was included in the bill sent to the House during the 69th Congress after witnesses at the committee hearings claimed that, as originally drafted, there were no such provisions in the bill. During the 69th and 70th Congresses, the House passed a bill with a specific acreage limitation provision. During the 70th Congress, the Senate was told through a committee report and by the sponsor of the legislation that its bill was substantially the same as the bill passed by the House. There was no objection in the House when it considered the Senate bill with its general incorporation of reclamation law rather than the specific language previously used in the House version of the legislation. All this points to an interpretation opposite to that urged by the landowners.

In support of their position, therefore, the landowners must rely on such evidence as the failure of the Senate committee to adopt Senator Ashurst's proposed amendment or Senator Phipps' proposed bill and the failure of the Senate to adopt Senator Hayden's proposed amendment. However, statutory interpretation cannot rest on unexplained actions of a Congressional committee.<sup>69</sup> Simi-

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<sup>69</sup> To the extent that there is an explanation for any of these committee actions, it is that the Phipps bill was rejected as inadequate for reasons unrelated to the acreage limitation provision.

larly, we cannot interpret a statute based on inferences the landowners seek to draw from proposed amendments to legislation that were never brought to a vote or even seriously debated on the floor. It could just as reasonably be inferred that the amendments were not adopted because the legislation was considered to have already incorporated the proposed changes. *United States v. Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962). Cf. *National Automatic Laundry and Cleaning Council v. Shultz*, 143 U.S.App.D.C. 274, 443 F.2d 689, 706 (D.C. Cir.1971). The landowners also rely on statements of the bill's opponents. This type of evidence may be reliable when circumstances indicate the opponents' statements correctly indicate the views of the bill's proponents, *Arizona v. California, supra*, 373 U.S. at 583 n. 85, 83 S.Ct. 1468. However, in this case there is positive evidence that the bill's opponents were incorrect and their objections, at least on the part of Senator Hayden, were not maintained throughout the course of the debates. In view of all the circumstances reviewed above, we cannot rely on a few statements of opponents during the course of lengthy proceedings primarily concerned with other aspects of the proposed legislation as the correct version of the Project Act's legislative history. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 n. 24, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

The landowners seek to bolster their argument by claiming that Congress was not concerned with lands already irrigated by private efforts when it passed Section 46. They contend that Section 46 was designed only to prevent speculative profits made on unimproved arid lands that became part of a federal reclamation project. Since Congress was unconcerned with productive lands such as those in the Imperial Valley when Section 46 was passed, their argument goes, Congress was not violating any basic policy when shortly thereafter it exempted the Imperial Valley from the acreage limitations in Section 46. If this interpretation of Section 46 were correct, there would be

less of a need to find a specific exemption for the Imperial Valley in the legislative history.<sup>60</sup>

The landowners' interpretation of Section 46, however, is not correct. The statutory language makes acreage restrictions specifically applicable to all private lands receiving water through federal reclamation projects and makes no distinction between lands previously unproductive and lands previously productive because irrigated by non-federal projects. Congress was well aware when it passed Section 46 that many federal reclamation projects were initiated to supplement or replace non-federal irrigation projects, as was done in the Imperial Valley. Section 46 was designed to strengthen both the anti-speculative and anti-monopoly policies of the reclamation laws, and there is no question that Congress intended it to apply to previously irrigated and productive lands such as those in the Imperial Valley. *United States v. Tulare Lake Canal Co.*, *supra*, 535 F.2d at 1112-1113, 1119, 1121 at n. 107, 1132.

It is usually true that most of the land included in a reclamation project is privately owned; it is usually true that the private lands are already under irrigation through facilities developed at private expense; it is usually true that the reclamation project only supplements or regulates existing water supplies.

*Id.* at 1143.

## VI. Administrative Practice.

The landowners next claim that the actual practice of the Department of the Interior supports their position. Relying on both a legal interpretation favorable to their position and the lack of Department enforcement of the excess lands provision of Section 46, they argue that this administrative practice is entitled to great, if not conclu-

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<sup>60</sup> The logical extension of this argument would in fact be that acreage limitations would not apply unless Congress specifically mandated such a result.

sive, weight in the statutory construction of the Project Act, has been ratified by Congress, and has been relied upon to such an extent that it cannot now be changed.

The legal interpretation upon which the landowners rely is a letter from Ray Lyman Wilbur, Secretary of the Interior, to the Imperial Irrigation District dated February 24, 1933.<sup>61</sup> It is important to examine this letter carefully before evaluating the landowners' claims.

The letter begins by referring to the then-pending suit of *Malan v. Imperial Irrigation District* and the allegation therein that, under the reclamation law, water cannot be delivered from the All-American Canal to any landowner owning more than 160 acres of land. Secretary Wilbur states that the allegation in the *Malan* litigation is an inaccurate statement of the reclamation law but that the allegation presumably refers to Section 5 of the Reclamation Act of 1902. The Wilbur letter asserts that Section 5 provides that no water shall be *sold* except under certain conditions but does not provide that no water shall be *delivered* from a canal constructed by the government and that the Project Act and the contract with the Imperial Irrigation District do not concern the sale of water and further provide that there will be no charge for the delivery of water.

This portion of the Wilbur letter, whether legally correct or not,<sup>62</sup> is irrelevant to the present case. It concerns only the applicability of Section 5 of the Reclamation Act of

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<sup>61</sup> The letter is reprinted as Appendix E to Opinion M-36675, *Applicability of the Excess Land Laws [to] Imperial Irrigation District Lands*, 71 I.D. 496, 529 (1964) (hereinafter referred to as the Barry opinion.)

<sup>62</sup> The landowners advance this argument to justify reversal of Judge Murray's decision in the residency case. Judge Murray had rejected such an argument. *Yellen v. Hickel, supra*, 352 F.Supp. at 1305-1306.

1902. It does not purport in any way to consider Section 46 of the Omnibus Adjustment Act of 1926. The reasoning of this section of the Wilbur letter cannot apply to Section 46 because that statute does not speak in terms of the sale of water.

The next portion of the Wilbur letter states that the question of the application of the 160-acre limitation had been carefully reviewed and the conclusion had been reached that the limitation did not apply to lands "now cultivated and having a present water right."<sup>63</sup> This conclusion is then justified by the argument that Congress recognized that lands in the Imperial Valley had vested water rights when it provided that there be no charge for storage, use, or delivery of water and that previous decisions of the Bureau of Reclamation had held that Section 5 of the Reclamation Act of 1902 did not prevent recognition of vested water rights for areas larger than 160 acres and that it permitted continued delivery of water to satisfy vested water rights in single ownerships larger than 160 acres.<sup>64</sup>

While this second argument is directed only at Section 5 of the Reclamation Act of 1902 and never mentions Section 46 of the Onmibus Adjustment Act of 1926, a variation of that argument with respect to Section 46 has been asserted as one of the landowners' main arguments, i. e., that the recognition of "present perfected rights" by the Project Act is incompatible with the application of the excess lands provision of Section 46. Significantly, however, the Wilbur letter makes no mention of the other landowners' assertions concerning the purported incon-

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<sup>63</sup> 71 I.D. at 530.

<sup>64</sup> Intertwined with this argument is the assertion, previously discussed, that Section 5 of the Reclamation Act of 1902 cannot apply because no sale of water is involved.

sistencies between the Project Act's reimbursement provisions and Section 46, the inapplicability of the excess lands provision of Section 46 because of the restricted incorporation of reclamation law by Section 14 of the Project Act, and the inapplicability of Section 46 by implication because of the public lands provisions of Section 9 of the Project Act. As to these arguments, the Wilbur letter, no matter how convincing or dubious its reasoning, can provide absolutely no support.

This letter cannot be given the weight the landowners seek. The letter was written after the Department of the Interior contracted with the Imperial Irrigation District. There is no evidence that the Department reached a conclusion before entering into the contract that the 160-acre limitation did not apply in the Imperial Valley. After a search by the Department, the only positive evidence that was uncovered on this question was that before the execution of the contract the Department had actually taken the position that the excess land laws would apply in the Imperial Valley.<sup>65</sup> The Wilbur letter was in response to a request for a ruling by the Imperial Irrigation District, which hoped to receive a formal ruling that acreage limitations did not apply but did not want a formal ruling if the conclusion came out the other way.<sup>66</sup> No formal opinion on this issue was prepared by the Solicitor of the Department at that time.<sup>67</sup>

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<sup>65</sup> 71 I.D. at 509 n. 25.

<sup>66</sup> *Id.*

<sup>67</sup> After the Wilbur letter was issued, representatives of the Imperial Irrigation District expressed concern that the letter did not discuss the applicability of Section 46 of the Omnibus Adjustment Act of 1926. A letter from Porter W. Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, to the Bureau's Regional Counsel in Los Angeles, dated March 1, 1933, took the position that the same principle discussed in the Wilbur letter with respect to Section 5 of the Reclamation

Doubts as to the legal validity of the Wilbur letter arose within the Department in 1944. The Coachella Valley in California also received water through the All-American Canal. The original contract with the water district in that Valley contained no specific provisions for enforcement of the excess land laws. During negotiations for a supplemental Coachella contract, the Bureau of Reclamation, believing that the acreage limitations applied, requested a formal ruling from the Solicitor.<sup>68</sup> The resulting opinion of Solicitor Fowler Harper, approved by the Secretary of the Interior in 1945, determined that the excess land provisions of the reclamation laws applied in the Coachella Valley and that nothing in the Boulder Canyon Project Act precluded their application to that Valley. The Harper opinion criticized the Wilbur letter as an informal decision designed to help the Imperial Irrigation District in the litigation then pending in state court concerning the validity of the District's contract. However, the Harper opinion did not directly overrule the Wilbur letter. Instead the Wilbur letter was distinguished on the basis that it applied only to the Imperial Valley and did not cover the Coachella Valley.<sup>69</sup>

After the Harper opinion was issued, the Veterans of Foreign Wars inquired in 1948 about the inconsistency of application of the 160-acre limitation in the Imperial and Coachella Valleys. The Secretary of the Interior at that time, Julius A. Krug, responded in a letter which did not attempt to legally justify or explain any inconsistencies between the Harper opinion and the Wilbur letter. Instead,

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Act of 1902 applied to Section 46. See Appendix F to the Barry opinion, 71 I.D. at 531-532. There is no claim that this letter should be considered as an administrative construction of the Project Act to which the courts should defer.

<sup>68</sup> 71 I.D. at 514.

<sup>69</sup> Solicitor's Opinion, M-33902 (May 31, 1945), found as Appendix H to the Barry opinion, 71 I.D. at 533-548.

Krug justified the non-application of the 160-acre limitation in the Imperial Valley on the ground that owners and subsequent purchasers of land in the Imperial Valley were entitled to rely upon the Wilbur letter and it would be unfair to change the situation even though the legal validity of the conclusions in the Wilbur letter might be questionable.<sup>70</sup>

In 1958, the question of the application of the 160-acre limitation in the Imperial Valley arose in proceedings before the special master appointed by the Supreme Court in the *Arizona v. California* litigation. The special master requested memoranda on the question and the Solicitor General then sought the views of the Solicitor of the Department of the Interior, Elmer F. Bennett. Solicitor Bennett's reply doubted that the acreage limitation question was relevant to the issues before the special master. Bennett's reply also came to essentially the same conclusion reached by Secretary Krug in 1948. Without undertaking any legal analysis of the issue, he concluded that water had been delivered pursuant to the contract since the early 1940s, that no legal challenge to the contract had been raised since the state court confirmation proceedings, that no administrative action had ever been taken to enforce the acreage limitation, and that it was no longer realistic and practicable to enforce that law even if it should have been enforced. The Solicitor General then filed a memorandum with the special master taking the position that non-compliance with the acreage limitations was not relevant to the issues before the special master. In a footnote, however, the Solicitor General's memorandum concluded that the acreage limitations of the reclamation laws applied to privately owned lands in the Imperial Valley receiving water from the All-American Canal.<sup>71</sup>

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<sup>70</sup> 71 I.D. at 515.

<sup>71</sup> 71 I.D. at 515-516.

The only legal analysis of the Department of the Interior, therefore, which supports the landowners' interpretation of the Project Act is the Wilbur letter of 1933. That letter does not purport to deal with the questions of interpretation raised in this case. The Department of the Interior itself began to have doubts about the legal soundness of the Wilbur letter's conclusions shortly after water deliveries through the All-American Canal began in the early 1940s but continued to adhere to the practice of nonenforcement of acreage limitations in the Imperial Valley because of its previous practice of nonenforcement. Finally, the legal validity of the conclusions in the Wilbur letter were specifically rejected by the Department of the Interior in 1964.

A thorough and comprehensive opinion by Solicitor Frank J. Barry was prepared in response to Congressional inquiries in 1961 and 1964.<sup>72</sup> The opinion specifically rejected the legal basis set forth in the Wilbur letter for concluding that Section 5 of the Reclamation Act of 1902 still permitted deliveries of water to excess lands that had vested water rights prior to the initiation of the reclamation project. The precedents cited in the Wilbur letter were actually special cases where the government acquired existing physical irrigation facilities for incorporation into a reclamation project and were not applicable in the Imperial Valley. The Barry opinion considered the language of the Project Act, its legislative history, the Wilbur letter and previous administrative practices and concluded that privately owned lands in the Imperial Irrigation District are subject to the excess land laws.

The landowners seek to elevate the legal conclusions reached in the Wilbur letter into the binding force of law. Without setting forth the facts in each of the cases upon which they rely, it suffices to say that such a proposition

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<sup>72</sup> The Barry opinion, fn. 61, *supra*.

is far too broad. The appropriate deference to be accorded an administrative construction of a statute is that a "consistent and longstanding" interpretation of a Congressional enactment by an agency charged with administration of that statute is entitled to "considerable weight" but it does not control the decisions of the courts. *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975). The ultimate responsibility of interpreting the language of Congress resides in the courts. *Zuber v. Allen*, 396 U.S. 168, 193, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969).

In the case of the Wilbur letter, there is an informal opinion reached under circumstances indicating a lack of careful consideration. It does not purport to even consider the portion of the reclamation law in question in this case. The legal conclusions of the Wilbur letter have not been consistently held to be correct by the Department of the Interior. Most if not all of its reasoning was implicitly rejected in the Harper opinion of 1945 and it was explicitly rejected in the Barry opinion of 1964. The Wilbur letter does not construe ambiguous or doubtful language in the Project Act but in a rather simplistic analysis not contained in a formal opinion purports to find an inconsistency between two different statutes. It is an interpretation made after enactment of both statutes and consequently never before Congress when the Project Act was being considered. In these circumstances, insofar as the application of the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926 is concerned, the Wilbur letter is not entitled to any deference as a proper construction of the Project Act and reclamation law. Cf. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976); *Shea v. Vialpando*, 416 U.S. 251, 262 n. 11, 94 S.Ct. 1746, 40 L.Ed.2d 120 (1974); *Zuber v. Allen, supra*, 396 U.S. at 192-193, 90 S.Ct. 314; *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n. 27, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977).

It is true that, in practice, the Department of the Interior did not enforce the 160-acre limitation on lands in the Imperial Irrigation District. This inaction was based at first upon the Wilbur letter which was itself an informal opinion that is legally incorrect and that does not even deal with the reclamation statute at issue in this case. Sometime thereafter, the Department of the Interior abandoned justifying its inaction on the analysis contained in the Wilbur letter but instead decided against nonenforcement of the 160-acre limitation because it had not been enforced before. Inaction based on previous inaction cannot be elevated into an administrative determination to which the courts should defer.<sup>73</sup>

The landowners contend that the "consistent" administrative interpretation that the 160-acre limitation did not apply to private lands in the Imperial Valley was brought to the attention of Congress and that Congressional failure to object amounts to a Congressional ratification of the Wilbur interpretation of the Project Act. Such a sweeping claim fails to stand up in light of an analysis of what can actually be considered to have been brought to the attention of Congress and the manner in which this occurred.

Many of the references in committee hearings upon which the landowners rely are brief references to the situation in the Imperial Valley contained in lengthy considerations of completely different reclamation projects such as the San Luis or Central Valley Projects. The claim of an exemption from application of the acreage limitations to private lands in the Imperial Valley was often raised by advocates of exemptions in allegedly similar situations in attempts to persuade Congress to specifically place such

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<sup>73</sup> Administrative practice plainly contrary to the law may be overturned no matter how long standing. *Baltimore & Ohio R. Co. v. Jackson*, 353 U.S. 325, 77 S.Ct. 842, 1 L.Ed.2d 862 (1957); *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957).

an exemption in another reclamation project. Rejection, or even acceptance, of an exemption claim for another project hardly amounts to deliberate Congressional consideration of the situation in the Imperial Valley. The same holds true for brief references to the Imperial Valley in government reports sent to various Congressional committees.

The best evidence the landowners can muster on this argument concerns the 1958 hearings before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs reviewing the acreage limitation provisions in the reclamation law.<sup>74</sup> The subcommittee was concerned with the future shape of the reclamation law in general and the application of acreage limitation provisions to a small number of new projects in particular. It was not concerned with legislation for the Imperial Valley. The situation in the Imperial Valley and the Wilbur letter were brought to the subcommittee's attention. Counsel for the Imperial Irrigation District testified shortly after appearing before the Supreme Court in the *Ivanhoe Irrigation District v. McCracken* litigation. His testimony echoed the theory concerning vested water rights that was enunciated by the California Supreme Court in that series of cases and was later rejected by the Supreme Court. These circumstances cannot amount to Congressional ratification by silence of the Wilbur interpretation. Significantly, the chairman of the subcommittee, Senator Anderson, was the Senator who later initiated the Department of the Interior review that culminated in the Barry opinion rejecting the Wilbur interpretation.

The landowners seek to draw favorable implications from the fact that Congress took no action with respect to

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<sup>74</sup> *Acreage Limitation (Reclamation Law) Review: Hearings on S. 1425, S. 2541, and S. 3448, Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 85th Cong., 2d Sess. (1958).*

private lands in the Imperial Valley when in 1946 it amended Section 9 of the Project Act dealing with public lands and when it rejected an attempt by the Bureau of Reclamation to extend its control over operation of the project works. However, there is no evidence that the acreage limitation question was brought to the attention of Congress during its consideration of these other matters. For example, the 1946 amendment to Section 9 of the Project Act merely extended the veterans' preference in that Section to veterans of World War II and to those who had served in the Coast Guard.<sup>78</sup> Furthermore, in contrast with the Imperial Irrigation District's dispute with the Bureau of Reclamation that the landowners refer to, Congress took no action when the present dispute over application of the acreage limitations arose after the 1964 Barry opinion, so it could be argued, in terms of the landowners' frame of analysis, that Congress acquiesced in this new interpretation of the reclamation laws. We draw neither conclusion from Congressional inactivity. The point is that in the absence of specific indications that Congress actually considered this problem, the incidents relied upon by the landowners cannot support the finding of Congressional ratification that the landowners desire.

This conclusion is buttressed by consideration of the landowners final version of this argument, i.e., that with all this information on the situation in the Imperial Valley, the repeated appropriations from 1936 to 1950 for continuing construction on the All-American Canal amounts to a Congressional ratification of the administrative construction as it is viewed by the landowners. However, the references relied upon by the landowners to show Congressional knowledge and consideration of the Wilbur letter do not date back earlier than 1944. There is no showing of Congressional knowledge and consideration, one

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<sup>78</sup> See 1946 U.S. Code Congressional Service pp. 1080-1081.

way or the other, prior to that year. In addition, in 1944 the Harper opinion cast considerable doubt over the validity of the Wilbur interpretation even if it did not specifically reject it in the case of the Imperial Valley, and Congress may have been aware of the later Department of the Interior opinion. Furthermore, by 1944 the Imperial Valley had already been receiving all of its irrigation water through the All-American Canal for about two years. Presented with this situation and the Harper opinion, the following appropriations may just as well be considered solely as Congressional ratification of the application of acreage limitations in the Coachella Valley. As before, the record here is too sparse and ambiguous to justify a conclusion that Congress approved of the Wilbur construction of the Project Act and the reclamation laws.

The landowners claim that it would be unfair to enforce the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926 because of individual landowner reliance on the Wilbur letter and the past non-enforcement of the 160-acre limitation. The landowners raise claims here based on broad generalizations that cannot apply under the facts of the case. There are many holdings of land in excess of the 160-acre limitation in the Imperial Irrigation District before the Wilbur letter was issued and these holdings could not have been acquired in reliance upon the assurances contained in that letter. In any event, the questions of reliance and estoppel presented by the landowners' argument here are not germane to this lawsuit. In operation, Section 46 requires compensation to excess land holders for the value of their property and their improvements to their property. It only excludes the increase in the value of the land attributable to the federal project. *United States v. Tulare Lake Canal Co., supra*, 535 F.2d at 1113 n. 74, 1144.<sup>76</sup> Furthermore, assuming that any individual

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<sup>76</sup> The District claims that the construction of the All-American Canal did not change the value of private lands in the District

landowner can make out a claim to greater compensation based on estoppel or some other theory, compensation will be available, for if the enforcement of the conditions of Section 46 "impairs any compensable property rights, then recourse for just compensation is open in the courts." *Ivanhoe Irrigation District v. McCracken, supra*, 357 U.S. at 291, 78 S.Ct. at 1183. Cf. *United States v. Union Oil Company of California*, 549 F.2d 1271, 1281 (9th Cir. 1977). The point is that the possibility that such compensation may be mandated cannot defeat compliance with the conditions of the reclamation laws.

In a variation on the reliance on administrative practice argument, the District relies on its contract with the United States. Article 30 of the contract paraphrases Section 14 of the Project Act. The Coachella Valley contract contains an identical section but, in addition, contains additional clauses dealing with the divestiture of excess lands. The District argues that these additional clauses would be superfluous if the section based on Section 14 of the Project Act was sufficient to incorporate Section 46. However, it should be remembered that after the Barry opinion was issued in 1964 the District refused to agree to a supplemental contract with the United States that would govern the administration of the divestiture provisions of Section 46. From the discussion in Part IV, *supra*, it is clear that the general incorporation of the reclamation law in Section 14 of the Project Act that is carried over into

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because the Canal only provided an alternate means of conveying irrigation water already supplied by non-federal enterprise. We doubt that this is the case. The location of the Canal entirely within American territory, a project the District was unable to undertake on its own, is, in itself, a significant benefit. The appraisal process takes into account the value, or lack thereof, of the federal project to the private lands. However, Section 46 would still apply because it was the intent of Congress to make small family farms the recipients of water delivered by federal reclamation projects.

the contract is sufficient to mandate application of Section 46.<sup>77</sup>

### **VII. Conclusion.**

In No. 71-2124, the district court's order denying leave to intervene is reversed, the protective notice of appeal is validated, and the judgment is reversed. In Nos. 73-1333 and 73-1388, the judgment is vacated and the case is remanded with instructions to dismiss the complaint because of lack of standing.

Appendix to follow

[The appendix to the court's opinion is reproduced as Appendix B herein *infra* at 62a.]

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<sup>77</sup> For the reasons set out in Part IV of this opinion, the District's argument that separation of the contract provisions for delivery of water and for construction, operation, and maintenance of the Canal precludes application of Section 46 must also be rejected.

**APPENDIX B****UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**UNITED STATES OF AMERICA,**

**Appellee,**

**v.**

**IMPERIAL IRRIGATION DISTRICT, a corporation,**

**Appellee,**

**JOHN M. BRYANT, et al.,**

**Appellees,**

**STATE OF CALIFORNIA,**

**Appellee.**

**BEN YELLEN, et al.,**

**Appellants.**

**No. 71-2124**

**[August 6, 1973]**

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**Before: HASTIE,\* MERRILL and ELY, Circuit Judges.**

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**ORDER ALLOWING INTERVENTION**

**It appearing that the decision of the district court in this case, 322 F.Supp. 11 (S.D.Cal.1971) and a subsequent decision of another judge of the same court in *Yellen v. Hickel*, 335 F.Supp. 201 (S.D.Cal.1972) disclose conflicting rulings on questions of law that may significantly affect**

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**\* Honorable William H. Hastie, Senior United States Circuit Judge, Third Circuit, sitting by designation.**

the course of economic development of the Imperial Valley of California; and it also appearing that an appeal to this court in *Yellen v. Hickel* is pending at our Nos. 73-1333 and 73-1388, but that the election of the United States, the unsuccessful plaintiff, not to take an appeal in the present case precludes appellate review unless the interested Imperial Valley landowners who are before us seeking to intervene are allowed to do so and to perfect and prosecute a protective appeal that they have noticed; and it further appearing that the order of the district court denying intervention, from which the interested landowners are now appealing, was made before the district court decision in *Yellen v. Hickel* and, therefore, that the district court could not anticipate the decisional conflict in the light of which this court now must act; and because it is the responsibility of this court to avoid, where feasible, the confusion and uncertainty that would result if two conflicting final decisions on legal issues of public and private importance should both be in force in this circuit.

Now, therefore, it is ORDERED that the order of the district court denying the petition of the appellants to intervene in this cause is reversed, and intervention as prayed is allowed nunc pro tunc and the protective appeal noticed by the intervenors is validated.

It is further ORDERED that the Clerk shall in due course calendar this appeal and the appeal in *Yellen v. Hickel* for hearing on the same day before the same panel of this court.

The parties to this appeal shall be privileged to supplement their briefs and the record heretofore filed herein.

**APPENDIX C**

**United States Court of Appeals,  
Ninth Circuit.**

**UNITED STATES of America,  
Plaintiff-Appellee,**

**v.**

**IMPERIAL IRRIGATION DISTRICT, a  
corporation, Defendant-Appellee,**

**John M. Bryant et al.,  
Defendants-Appellees,**

**State of California, Defendant-Appellee,**

**Ben Yellen et al., Appellants.**

**Ben YELLEN et al., Plaintiffs-Appellees,**

**v.**

**Cecil D. ANDRUS et al.,  
Defendants-Appellants,**

**Ben YELLEN et al., Plaintiffs-Appellees,**

**v.**

**Cecil D. ANDRUS et al.,  
Defendants-Appellants,**

**W. L. Jacobs et al.,  
Defendants-Appellants.**

**Nos. 71-2124, 73-1333 and 73-1388.**

**April 23, 1979.**

**Appeals from the United States District Court for the  
Southern District of California.**

Before BROWNING and KOELSCH, Circuit Judges,  
and WOLLENBERG\*, District Judge.

WOLLENBERG, District Judge:

*I. Rehearing and Rehearing In Banc*

In petitioning for rehearing and rehearing in banc of the decision of this Court in No. 71-2124, filed August 18, 1977, appellees Imperial Irrigation District and John M. Bryant, et al., argue that standing of the Yellen group, intervenors-appellants herein, is predicated on the erroneous assumption that if Section 46 of the Omnibus Adjustment Act of 1926,<sup>1</sup> 43 U.S.C. 423e, were to be enforced,

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\* The Honorable Albert C. Wollenberg, Senior United States District Judge for the Northern District of California, sitting by designation.

<sup>1</sup> In pertinent part, Section 46 provides that:

No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States . . . and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. . . . Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior.

land in the Imperial Irrigation District would become available at below-market prices. Said appellees further argue that the decision is internally inconsistent and is contrary to this Court's decisions in *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976), and *Turner v. Kings River Conservation District*, 360 F.2d 184 (9th Cir. 1966).

Appellees take the position that even if the Court orders enforcement of Section 46, land in the District would not become available at below-market prices, and thus the relief would not end the harm of which appellants complain as required for standing by *Bowker v. Morton*, 541 F.2d at 1350. Enforcement of Section 46 would require that landowners execute recordable contracts for the sale of land in excess of 160 acres per private owner in order to receive irrigation water on the 160 acres. Sales of land to meet the 160-acre limitation must by statute be at lower than market prices. Appellees state that Section 46 does not apply after March 1, 1978, because one-half of the construction charges for the irrigation project will have been paid. We held in *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1977), *cert. denied*, 429 U.S. 1121, 97 S.Ct. 1156, 51 L.Ed.2d 571 (1977), that the statement in Section 46 that in the initial breakup of excess lands the Secretary of the Interior must fix the sale price "on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works" applies regardless of the fact that construction charges for the irrigation project have been repaid. This decision expressly applies to all federal reclamation projects subject to Section 46. *Id.* at 1118. As we recognized in our opinion of August 18, 1977, 559 F.2d at 514, 522, the irrigation works added substantial value to the land for agricultural purposes, and thus it is only reasonable to infer that sales under the *Tulare* formula will be at below-market prices. Indications at trial by the Solicitor of the Department of the Interior that the Department has in the past been willing to recommend that

excess lands be sold at current market values does not override the fact that the Secretary of the Interior is bound by law to discount the value added by the construction project in fixing sale prices for excess lands. That there was pre-project irrigation does not excuse this requirement. *United States v. Tulare Lake Canal Co.*, 535 F.2d at 1112-14.

The decision of August 18, 1977, in this action is neither inconsistent with *Bowker* nor is it internally inconsistent. The Court in *Bowker* set forth a three-prong test for standing which we applied in the case at hand; the test requires "that the plaintiffs must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendants' action (c) which injury will be redressed by the remedy sought." 541 F.2d at 1349. The Court denied standing in *Bowker* to plaintiffs who sought enforcement of the acreage limitation by sale of excess lands at "reasonable" prices. Intervenors in the acreage case presently before us do not seek what this Court cannot provide, namely sale of land at any specified price defined by what price was "reasonable." Intervenors in the acreage case merely seek enforcement of the requirement in Section 46 that sales be at prices below current market value. The Court can issue a decree enforcing that code section that will ensure that any sales arising out of the acreage case are at below-market prices. While it is true that landowners cannot be forced to sell their lands, it is only reasonable to assume that some land will become available for sale rather than being put into other than agricultural uses.

For the same reason, our decision is not internally inconsistent. Although the parties who claim standing to bring the issues before the Court are essentially the same in both the residency and the acreage cases, as we stated in our opinion, 559 F.2d at 522, relief from the harm in the residency case is much more speculative than it is in the acreage case. In the residency case, plaintiffs seek to purchase land at prices they could afford, whereas in the

acreage case this same group alleges a desire to purchase land at below current market prices. The Court's order in the residency case cannot ensure sale of land at affordable prices, but in the acreage case it can enforce the pricing requirement of Section 46. Furthermore, in the residency case there is the alternative present for third-party land-owners of moving into the District which is not present in the acreage case.

Another reason our decision is not inconsistent with *Bowker* is that plaintiffs in *Bowker* did not even allege a desire to purchase land should it become available for sale, whereas intervenors in the acreage case did allege such a desire.<sup>2</sup> The appellate court in *Bowker* stated that one reason it denied standing in that case was that plaintiffs did not allege that they sought to purchase land. 541 F.2d at 1350. Plaintiffs in *Bowker* also were not shown to meet the eligibility requirement to purchase land made available for sale as they were not residents of the district in which they sought to have the statute enforced. The gravamen of the complaint of the *Bowker* plaintiffs was that they were subject to a competitive disadvantage as farmers in a federally irrigated area in which the acreage limitation was in effect because the limitation was not being enforced in a state service area. Similar infirmities in the group of plaintiffs distinguish *Turner v. Kings River Conservation District*, 360 F.2d 184 (9th Cir. 1966), from the case at hand in that plaintiffs denied standing in that case did not allege a desire to purchase land in the irrigation district upstream as to which they sought to have the acreage limitation enforced.

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<sup>2</sup> The Amendment to Complaint in which the *Bowker* plaintiffs alleged a desire to purchase land in the area in question was not considered filed by the district judge because it had been filed without leave of court. Order filed August 2, 1973, *Bowker v. Morton*, No. C-70-1274. The First Amended Complaint filed by order of court thereafter on February 8, 1974, did not allege a desire to purchase land.

Finally, although the Court in *Bowker* did indicate that in that case a court order discontinuing delivery of water to excess lands would not insure that the remedy sought of making land available for sale would result, the record in this case supports a different conclusion. This is not a case where "the solution to [intervenors'] problem depends upon decisions and actions by third parties who are not before the court and who could not properly be the subject of a decree directing the result sought by [intervenors]." *Bowker v. Morton*, 541 F.2d at 1350 (citation omitted). Both the District and the landowners are parties to the action, the latter having intervened as defendants below. Thus, both will be bound by a decree holding Section 46 applicable to excess lands and ordering a cutoff of water to any such lands where recordable contracts have not been executed. It is also clear from the record in this case that land in the Imperial Valley has long been devoted to agricultural use, that the entire economy of the Valley is based on agriculture and agricultural support industries, that the particular 233,000 acres involved constitutes some of the finest agricultural land in the world, and that federal irrigation facilities provide the only assured source of water in the Valley. Thus, "it [is] highly improbable that all of the large holdings of irrigable land would be withdrawn from agricultural use in order to avoid the requirements of Section 46." 559 F.2d at 522. Compare *id.* with *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 43, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

The petition for rehearing of appellee State of California on the ground that the Court's opinion does not place a proper emphasis on the Wilbur letter and questions of fairness stemming therefrom is also denied. Appellees raise nothing that was not thoroughly considered in reaching the Court's decision.

Judges Browning and Koelsch have voted to reject the suggestions for a rehearing en banc, and Judge Wollenberg has recommended rejection of the suggestion for rehearing

en banc. The full Court has been advised of the suggestions for en banc rehearing, and no judge of the Court has requested a vote on the suggestions. Fed. R.App.P. 35(b).

Accordingly, the suggestions for a hearing en banc are rejected.

## II. Attorneys' Fees

Appellants move for attorneys' fees for the appeal of action No. 71-2124 in which they were successful in reversing the district court decision. As a consequence of the appeal, an estimated 233,000 acres of agricultural land will become available for purchase at below-market prices in parcels of 160 acres or less. Appellants advance two theories to support their claim for attorneys' fees: that the Civil Rights Attorneys' Fees Award Act of 1976 provides for counsel fees in cases brought under 42 U.S.C. § 1983 and that counsel fees may be awarded where, as here, a suit confers a substantial benefit to a class.

The argument that the Civil Rights Attorneys' Fees Award Act of 1976 entitles counsel to fees in this action is specious. That Act provides for the award of counsel fees in cases brought to enforce the civil rights laws, including 42 U.S.C. § 1983 which creates a cause of action for a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Relying on the language of section 1983, appellants argue that the Civil Rights Attorneys' Fees Award Act of 1976 should be interpreted broadly to allow fees in cases which secure rights guaranteed by federal laws as well as those actions based on the federal Constitution. *Citing Blue v. Craig*, 505 F.2d 830 (4th Cir. 1974). There is no need to reach this question, nor need we decide whether this lawsuit's vindication of the statutory rights of appellants was sufficient to make out a claim under 42 U.S.C. § 1983. This action was not brought pursuant to that code section, and therefore there is no statutory basis for the award of fees.

The theory that attorney's fees should be awarded because this appeal will confer a substantial benefit on an ascertainable class has more promise for appellants,<sup>3</sup> but on analysis also fails to support an award of fees in this case.

The "substantial benefits" exception to the traditional rule disfavoring awards shifting legal fees is well recognized, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), and survives the rejection in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) of the more sweeping "private attorney general" theory of counsel fee recovery. See *id.* at 257, 264-65 n.39, 95 S.Ct. 1612. The justification for this exception is that identifiable persons who benefit substantially from action of the party seeking fees should share the costs. "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills*, 396 U.S. at 392, 90 S.Ct. at 625. See also *Hall v. Cole*, 412 U.S. 1, 5-6, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). However, because the beneficiaries frequently are not parties or members of a certified class before the court, this exception is subject to an important limitation that bars an award in this case. The limitation is that there must be before the court a party against whom the court can assess fees who stands in such a relationship to the benefited class that the award will "operate to spread the costs proportionately" and "with some exactitude" among the identifiable beneficiaries of the fee-seeker's success. *Mills*, 396 U.S. at

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<sup>3</sup> Appellants do not seek fees on the "common fund" theory, from which the substantial benefit theory derives. No basis for such a claim appears, as no "identifiable fund" has been "create[d], discover[ed], increase[d], or preserve[d]" by appellants' successful appeal. *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 768-69 (9th Cir. 1977).

394, 90 S.Ct. at 626; *Alyeska*, 421 U.S. at 265 n.39, 95 S.Ct. 1612. Only when this is true will attorney's fees be effectively spread among those who stand to gain from the litigation without contributing to it, rather than simply being shifted to the loser.<sup>4</sup>

The two leading Supreme Court cases are illustrative. In *Mills*, a shareholder prevailed in an action to set aside the merger of his corporation into another because in recommending approval of the merger the directors of his corporation had failed to disclose that they were controlled by the acquiring company. The Court shifted the shareholder's attorney's fees to the corporation because the suit conferred a substantial benefit on all shareholders and the corporation itself, and because "[T]he court's jurisdiction over the corporation as the nominal defendant ma[kes] it possible to assess fees against all of the shareholders through an award against the corporation." 396 U.S. at 395, 90 S.Ct. at 627. All shareholders benefited from vindication of the securities fraud rules and, by requiring the payment of the counsel fees from the corporate treasury, all would be taxed their proportionate share of the costs through lowered dividends. The reasoning in *Hall v. Cole* is similar: the plaintiff-union member vindicated rights of free speech in union affairs and thus "rendered a substantial service to his union as an institution and to all of its members" (412 U.S. at 8, 93 S.Ct. at 1948); shifting plaintiff's counsel fees to the union would effectively charge all of the members with the cost of achieving the common benefit by taking a share of each member's dues.

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<sup>4</sup> As the *Mills* Court put it: "[t]o award attorneys' fees in such a suit to a [successful] plaintiff . . . is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396-97, 90 S.Ct. 616, 628, 24 L.Ed.2d 593 (1970). See also *Hall v. Cole*, 412 U.S. 1, 6, 93 S.Ct. 1943, 36 L.Ed.2d 102 (1973).

Appellants urge, without supporting analysis, that their case is analogous to *Mills* and *Hall v. Cole*. If this is so, it must be because their success benefited a distinct class (those who will purchase excess irrigated land as a result of enforcement of the acreage limitation<sup>5</sup>), and because a suitable party is present (the District) against whom counsel fees can be assessed. Appellants satisfy the first requirement but not the second.

The class of beneficiaries to which appellants point is suitably "small in number and easily identifiable" (*Alyeska*, 421 U.S. at 264 n.39, 95 S.Ct. at 1625) to permit recovery under the substantial benefit theory.<sup>6</sup> It is not determinative that individual members of the class will not be identifiable unless and until excess land is sold

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<sup>5</sup> Appellants do not describe the precise nature of the benefits this class will reap, although the primary benefit—the chance to buy land below market price—is evident. If the benefits are pecuniary only, the substantial benefits theory may be unavailable. See *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 768-69 & n.7 (9th Cir. 1977). But see *Mills v. Electric Auto-Life Co.*, 396 U.S. 275, 394 & n.19, 93 S.Ct. 1943, 36 L.Ed.2d 102 (1970) (approving cases applying theory to pecuniary benefits). We assume without deciding that appellants' success in this case will produce non-pecuniary as well as pecuniary benefits, and that the substantial benefits theory is available where the benefits are mixed.

<sup>6</sup> Appellants estimate that, as a result of their appeal, 233,000 acres of excess land will be freed for sale. If those lands are purchased in parcels of the maximum size (160 acres), approximately 1,450 parcels would be available. Smaller parcels would increase the number of beneficiaries in the class, but there can be little doubt the number would remain suitably small. Cf. *Burroughs v. Bd. of Trustees*, 542 F.2d 1128, 1132 (9th Cir. 1976) (no basis for determining size of the beneficiary class); *Brennan v. United Steelworkers of America*, 554 F.2d 586, 606 (3d Cir. 1977) (classes of 1,400,000, of 8,987, of 85,000, and of 250,000 are small enough).

Moreover, members of the beneficiary class can be readily identified by their land purchases.

below market value as a consequence of appellants' lawsuit. Ready identifiability is required to insure clear, concrete evidence that the fee-seeker's efforts produced actual benefits to others, and that fees are assessed only against beneficiaries—those who would be unjustly enriched by not sharing in the cost of producing the benefit—and not against persons whose positions are not substantially bettered because of the victorious lawsuit. If clear identification of the beneficiaries will come about reasonably soon after conclusion of the lawsuit, the substantial benefit theory may be available to authorize a fee award, although fixing and collecting the award would have to await identification of the beneficiaries. Cf. *Van Gembert v. Boeing Co.*, 573 F.2d 733, 736-37 (2d Cir. 1978).

But appellants fail to satisfy the second requirement: they have made no showing that the District is a proper party to be charged with appellants' attorneys' fees under the substantial benefit theory. The District is not in the same position as the corporation in *Mills* or the union in *Hall v. Cole*. In those cases the beneficiaries had pre-existing relationships with the corporation or union, and had contributed funds to the treasury from which the fee award was to come.<sup>7</sup> Thus, because the result secured in *Mills* and *Hall v. Cole* was, by its nature, of benefit to each shareholder or union member, the court had "reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting" through charging fees to the treasury to which each shareholder or union member had contributed in common. *Alyeska*, 421 U.S. at 265 n.39, 95 S.Ct. at 1625 n.39. Cf. *Skehan v. Bd. of Trustees of Bloomsburg State College*, 538 F.2d 53, 56 (3d Cir. 1976) (en banc). In this case, the result achieved is not beneficial to all landowners within the District. Those who own ex-

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<sup>7</sup> See Note, *Fee Awards and the Eleventh Amendment*, 88 Harv.L.Rev. 1875, 1883 (1975).

cess lands will be required to sell the excess at below-market prices, or will no longer receive water for irrigating those lands. If appellants' attorneys' fees were drawn from the District's general revenues, there would be no congruence between the funds disbursed as the fee award and the funds taken in from the beneficiary class in whose name that award is made.

Appellants suggest no alternative method of using District revenues as a vehicle to procure fees from the as-yet-unidentified beneficiaries. Their motion is to charge the District now for their fees. If an alternative is possible,<sup>8</sup> appellants have not advanced it, and the District has had no opportunity to respond. There is no basis before us for assessing attorneys' fees against the District.

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<sup>8</sup> It might be suggested that the District could use its powers to levy assessments against land with the District (see Cal. Water Code §§ 25500-26500) or to collect charges for water service to District landowners (*id.* §§ 22280-22283) to pass fee costs on to the beneficiaries. We do not know whether the District has the power under state law to tax such supplemental amounts against a distinct class of landowners. We do not know if it would do so (assuming it has the power) absent a court order. We do not know if an order requiring such surcharges would comport with principles of comity or with the Eleventh Amendment. Moreover, we have found no case holding attorney's fees assessable against a governmental body, as opposed to a union, corporation, or similar private body, on a pure substantial benefits rationale. See *Dawson, Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv.L.Rev. 849, 897, 920-21 (1975). See also Note, *Reimbursement for Attorneys' Fees from the Beneficiaries of Representative Litigation*, 58 Minn.L.Rev. 933, 944-45 (1974).

Appellants have not advanced this surcharge possibility. We need not pass upon it *sua sponte* and we decline to do so in light of the substantial questions it raises.

### III. Costs

Appellants who were successful on appeal in No. 71-2124 have submitted a bill of costs in timely fashion pursuant to Federal Rule of Appellate Procedure 39(c). Appellants in Nos. 73-1333 and 73-1388, who were successful on appeal of the issues raised in those cases, did not submit a timely cost bill because they believed that these three cases had been consolidated for appeal and that therefore under Federal Rule of Appellate Procedure 39(a), a split decision had been rendered, and no party was entitled to costs because this Court did not order that costs be allowed.

Federal Rule of Appellate Procedure 39(a) reads in relevant part that "if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court." The cases giving rise to this appeal were tried separately below, and separate judgments were rendered. This Court's order of August 6, 1973, in No. 71-2124, provided that the issues arising out of these cases would be considered together on appeal, but it did not formally consolidate the cases. Therefore, the parties should be allowed costs in the case in which they prevailed. It has long been recognized that prevailing parties may be awarded costs on appeal and that such costs may be assessed against the states. *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168 (1927).

The Court's opinion of August 18, 1977, in *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977), should be modified to substitute "considered" for that of "consolidated" in the last sentence of the second complete paragraph on page 520. Because that sentence mislead them, appellants in Nos. 73-1333 and 73-1388 are granted permission to file their bill of costs as received by this Court on September 8, 1977.

ACCORDINGLY, IT IS HEREBY ORDERED that this Court's opinion of August 18, 1977, in *United States*

v. *Imperial Irrigation District*, 559 F.2d at 520, is modified to substitute "considered" for that of "consolidated" in the last sentence of the second complete paragraph.

IT IS FURTHER ORDERED that the bill of costs here-  
tofore lodged on behalf of appellants W.L. Jacobs, et al.,  
in Nos. 73-1333 and 73-1388, may be filed by the Clerk and  
that such filing shall be deemed timely.

IT IS FURTHER ORDERED that appellants in No. 71-  
2124 be awarded costs in the amount of \$3,218.25.

IT IS FURTHER ORDERED that appellants in Nos.  
73-1333 and 73-1388 be awarded costs in the amount of  
\$3,783.16

## APPENDIX D

United States District Court,  
S. D. California.

UNITED STATES of America,  
Plaintiff,

v.

IMPERIAL IRRIGATION DISTRICT,

a corporation, Defendant,

John M. Bryant, Robert C. Brown, Theodore B. Shank,  
Harold A. Brockman, Clara Marie Gutierrez, Charles  
E. Nilson, Kakoo D. Singh, Stephen H. Elmore and  
John Kubler, Jr., Landowner Defendants, both  
individually and on behalf of members of a class, to  
wit, all persons owning more than 160 acres of  
irrigable land within the Imperial Valley in California.

State of California, Intervening

Defendant,

No. 67-7.

Jan. 5, 1971.

## MEMORANDUM OPINION

TURRENTINE, District Judge.

### I. JURISDICTION AND NATURE OF THE CONTROVERSY

This is a civil action brought by the United States. This court has jurisdiction under Title 28, § 1345 of the United States Code. An actual controversy within the jurisdiction of this court exists as to whether the land limitation provisions of reclamation law (hereinafter "acreage limitation" or "160-acre limitation") have any application to privately owned lands lying within the boundaries of said defendant Imperial Irrigation District (hereinafter "District").

The parties to this controversy are plaintiff United States of America, defendant District, landowner defendants John M. Bryant, Robert C. Brown, Theodore B. Shank, Harold A. Brockman, Clara Marie Gutierrez, Charles E. Nilson, Kakoo D. Singh, Stephen H. Elmore and John Kubler, Jr., and each of them, both individually and on behalf of members of a class, to wit, all persons owning more than 160 acres of irrigable land within the District (hereinafter collectively, "landowner defendants") and intervening defendant State of California (hereinafter "California"). Heretofore, by orders duly entered, California and the landowner defendants were granted leave to intervene herein, the latter pursuant to Rule 23(b) (2), Federal Rules of Civil Procedure as representatives of a class consisting of some 800 persons, each of whom own irrigable lands in excess of 160 acres. The aggregate holdings of the members of the class were approximately 233,000 acres as of September 3, 1965.

Plaintiff contends that the 160-acre limitation applies to privately owned lands within the District; and all of the defendants contend in all respects to the contrary.

There is no controversy between plaintiff and the State of California over the application of the excess land laws to the state lands in its Imperial Waterfowl Management Area. The United States, the defendant District and private landowner defendants agree with the State of California that those state lands are not subject to the excess land laws.

This opinion incorporates the court's findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure.

## II. HISTORICAL BACKGROUND

The Imperial Irrigation District consists of lands in the Imperial Valley in California. Due to the below-sea-level topography of the Imperial Valley area, it was recognized

as early as the middle of the 19th century that irrigation by means of diversion and gravity flow from the Colorado River was feasible. In comparatively recent geologic time, the Gulf of California extended inland to the northwest. Its upper limits reached northward of Indio. Through the years, the heavily silt-laden Colorado River deposited sediment and built up a low, flat deltaic ridge entirely across the ancient gulf, cutting off the upper portion from its connection with the ocean. The resulting basin was then an inland sea with a surface area of nearly 2,000 square miles. The greatest depth of this sea was about 320 feet. Deprived of its connection with the Gulf of California, the severed sea dried up, and a portion of the bed which it occupied is now known as the Salton Basin. The greater area around and including this basin is known in its northern part as the Coachella Valley and in its southern part as the Imperial Valley.

In its natural condition, the entire region was an unproductive desert. The annual rainfall averages from two to three inches. The Colorado River and the Colorado River Delta east and south of the Imperial Valley are slightly above sea level. From the delta, the land slopes gradually north and west toward the center of Imperial Valley, which is almost entirely below sea level.

During occasional flooding of the Colorado River, the overflow waters would flow down the slopes of the delta northward into the bottom of the great depression and the Salton Basin. These floodwaters would concentrate more or less in depressions and channels leading from the delta region into what is now known as Salton Sea. These channels, or depressions, form natural canals for diversion of the Colorado River waters into Imperial Valley.

The initial appropriations and diversions of water from the Colorado River were made by the California Development Company, a privately owned corporation organized in 1896 and the predecessor in interest of defendant Dis-

trict, which was organized in July of 1911. These appropriations and diversions laid the foundation for the present perfected water rights which have admittedly existed within the boundaries of the District from and after June 25, 1929, the effective date of the Boulder Canyon Project Act.

The first water from the Colorado River was diverted and brought to the Valley in July of 1901. This water, which was diverted about one mile north of the international boundary with Mexico, was carried by the Alamo Canal through Mexican territory and back into the United States at Imperial Valley to avoid the high mesa and sand-hill country north of the international boundary. For most of its 50 mile course in Mexico, this canal made use of an ancient overflow channel known as the Alamo River, which formerly led into the Salton Sea.

The Alamo Canal, from its point of reentry into the United States, as well as the lateral canals through which water diverted from the river was ultimately distributed to land in the Valley, were owned by seven mutual water companies which were organized by the California Development Company. The stock in such mutual water companies was ultimately acquired by the individual landowners to whose land the water was supplied.

By 1903, through the distributive facilities constructed by the local mutual water companies, approximately 25,000 acres of valley lands were in irrigated cultivation, all as a result of diversions from the River. By the following winter, the irrigated acreage was increased to 100,000. 181,191 acres were irrigated by 1910, 308,009 in 1916, 413,440 in 1919, and 424,145 in 1929, the year when the Boulder Canyon Project Act took effect.

In 1905, the Colorado River broke through its banks, which had over the years been built up above the surrounding terrain, and completely changed its course, sending a flood of water through the Alamo Canal and over the broad

flat area of Imperial Valley. As a consequence, for many months the entire flow of the River passed through the washed-out heading, through the Alamo Canal and into Imperial Valley, creating Salton Sea with a surface area of 330,000 acres, and threatening the entire valley with destruction. The surface of the Salton Sea, formerly nearly dry at an elevation of 273 feet below sea level, was raised to 190 feet below sea level. The efforts of the California Development Company to close the breach were unsuccessful. The Southern Pacific Company's tracks being endangered, the Southern Pacific Company advanced funds to the California Development Company to control the River and took controlling interest therein as security. By utilizing its own resources the Southern Pacific Company closed the breach in the west bank of the River and returned the River to its channel. In the Spring of 1916, the Southern Pacific Company foreclosed on the California Development Company's interests and, in June of that year, transferred them to defendant District.

In 1922-1923 District acquired all of the mutual water companies that had been organized by California Development Company. Since that time and until the present, the District has performed the entire function of diverting, transporting and distributing the water supply to farm holdings in Imperial Valley.

On November 24, 1922, the Colorado River Compact, an interstate agreement relating to allocations and rights in the waters of the River, was signed by commissioners representing the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. It became effective June 25, 1929.<sup>1</sup>

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<sup>1</sup> The Colorado River Compact was authorized by an Act of Congress dated August 19, 1921, 42 Stat. 171, and by the Acts of the Legislatures of the participating states. Congress approved it in section 13 of the Boulder Canyon Project Act, 43 U.S.C. § 617l.

The construction of the All-American Canal was authorized as part of the general project authorized by the Boulder Canyon Project Act (hereinafter "Project Act" or "Act") of December 21, 1928, effective June 25, 1929, 45 Stat. 1057, 43 U.S.C. § 617 et seq.

At the time of the taking effect of said Project Act, the District had a distribution and drainage system which was wholly financed, constructed, maintained and operated by local means. The distribution system then, as of June 25, 1929, comprised approximately 1,700 miles of main and lateral canals, providing for the irrigation by waters diverted by it from the Colorado River of approximately 424,000 privately owned acres, computed on a single cropping basis. All of this acreage was, as of June 25, 1929, being irrigated by and with Colorado River water, carried through the Alamo Canal. In 1966, just prior to the bringing of this action, there were approximately 438,000 acres irrigated with water transported through the All-American Canal.

Pursuant to the Project Act, the Government constructed Hoover Dam, at Black Canyon, and incidental works, completing the construction of the dam in 1935. On February 1, 1935, under the direction of the then Secretary of the Interior (hereinafter "Secretary"), Harold L. Ickes, the Government began storing water in Lake Mead, the reservoir created by Hoover Dam, and since that date the Government has continuously operated and maintained Hoover Dam for the purposes specified in the Project Act.

On December 1, 1932, the United States and the District, acting pursuant to the Project Act, entered into a contract providing, *inter alia*, for construction of a main canal connecting Imperial and Coachella Valleys and requiring repayment by the District for the costs of construction. Due to conflicts not material to this case, Coachella Valley landowners were not included in the District, but formed a separate District, the Coachella Valley County

Water District, which executed a similar, though independent, contract with the United States in 1934 calling for construction of water delivery structures and delivery to lands in Coachella Valley.

Pursuant to its 1932 contract with the District, the United States constructed Imperial Dam and the All-American Canal, commencing construction in August, 1934. In 1940, the United States, while retaining the care, operation and maintenance of these facilities, commenced delivering water through the All-American Canal for use within the District. Also pursuant to the contract, the Secretary transferred to the District, on March 1, 1947, the care, operation and maintenance of the main branch of the All-American Canal west of Engineer Station 1098.

Since 1942, the District's entire water supply has been carried through the All-American Canal. Title to the Imperial Dam and the All-American Canal, as well as to Hoover Dam, is in the United States.

On March 4, 1952, the contract between the United States and the District was amended by a supplemental contract. On May 1, 1952, the Secretary transferred to the District the care, operation and maintenance of the works east of Engineer Station 1098.

The All-American Canal System, as provided for in the contract of December 1, 1932, was declared completed by the contract of March 4, 1952, between the United States and the District; repayment of construction charges commenced on March 1, 1955. The District's financial obligation was fixed at approximately \$25,000,000, repayable in forty annual installments, without interest. All such payments to date have been made from net power revenues derived from the sale of electrical energy generated by hydro-electrical facilities of the All-American Canal, costing the District approximately \$15,000,000. The cost of Hoover Dam and powerplant, estimated in 1965 as \$174,732,000, is being repaid with interest at three percent

primarily from power revenues at the dam. One exception to this is that \$25,000,000, of the cost of the dam, which was allocated to flood control, will be carried interest free by the Government until 1987.

### III. DEVELOPMENT OF THE CONTROVERSY

The 1932 contract provided, *inter alia*, for repayment by the District of the cost of the project works. It did not contain any provision requiring that acreage limitation apply to private lands within the District. On February 24, 1933, Secretary of the Interior, Ray Lyman Wilbur, in a letter mailed to the District, ruled that the 160-acre limitation did not apply to privately owned lands within the District.<sup>2</sup>

The Wilbur ruling was followed for 31 years and gave rise to an administrative practice which held the 160-acre limitation to be inapplicable to private land-holdings within the District and which endured for the same period and down to the rendition of Solicitor Frank J. Berry's opinion of December 31, 1964.<sup>3</sup> In that opinion, the Solicitor concluded that Secretary Wilbur's 1933 ruling was erroneous and that the Boulder Canyon Project Act by its plain terms incorporates those provisions of reclamation law which impose acreage limitation on lands served from federal reclamation projects, including the privately owned lands within the District.<sup>4</sup>

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<sup>2</sup> The full text of the letter is published in 71 Decisions of the Department of the Interior 496, App. E at 529.

<sup>3</sup> 71 Decisions of the Department of the Interior 496.

<sup>4</sup> The study leading up to this opinion was prompted by a letter dated August 7, 1961, from Senator Clinton P. Anderson, Chairman of the Committee on Interior and Insular Affairs, to Secretary Stewart Udall. In the letter, Senator Anderson advised the Secretary that he had received complaints from Southern California that the acreage limitation provisions of reclamation law were not being enforced in the Coachella and Imperial Valleys.

Subsequent to this ruling, the Department for several years attempted to negotiate a new contract with the District which would have incorporated acreage limitation. The failure of these negotiations resulted in this action for declaratory relief.

#### IV. THE BASIC ISSUE

The question of whether the 160-acre limitation has any application to privately owned lands within the boundaries of the Imperial Irrigation District depends upon an interpretation of the Project Act. In deciding this case, defendants urge the court to limit its inquiry to a judicial review of the 1933 Wilbur ruling. They contend that because of the long-standing administrative practice and the reliance thereon by landowner-defendants in the District, Wilbur's interpretation should be upheld if there is any reasonable basis for his decision, citing *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616, reh. den. 380 U.S. 989, 85 S.Ct. 1325, 14 L.Ed.2d 283 (1965). The court declines to follow this course and believes that this statement of the *Tallman* rule should not be controlling in this case for the following reasons.<sup>5</sup> In *Tallman*, the suit was brought by an unsuccessful applicant for an oil and gas lease in the Kenai National Moose Range in Alaska. For many years, the Secretary of the Interior had interpreted Executive Order 8979 and Public Land Order 487, which withdrew certain lands from settlement and commercial exploitation, as not prohibiting oil and gas leases because they were not "dispositions" as that term is found in the Executive Order 8979. The first applicants received the particular lease in question; the unsuccessful applicant asserted that these regulations had closed the lands to such leases and that his lease should be issued because the prior applicants had

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<sup>5</sup> There is of course no quarrel with the principle that in problems of statutory construction great deference is given to the administrative interpretation. See *Udall v. Tallman*, *supra*, 380 U.S. at p. 16, 85 S.Ct. 792 and cases cited therein.

applied when the lands were closed under the terms of these regulations. The court held that the Secretary's established interpretation was reasonable and hence entitled to controlling weight. The court observed that great deference is given to administrative interpretation of statutes, and that:

"When the construction of an *administrative regulation* rather than a statute is in issue, deference is even more clearly in order."<sup>6</sup> (emphasis supplied)

In this case, the basic problem is the meaning of an Act of Congress, not an administrative regulation. In addition, the controversy in *Tallman* was essentially a competition of private interests for commercial leases, while the decision whether acreage limitation applies under the Project Act involves important considerations of national policy, making this case less appropriate for application of the estoppel-like features of *Tallman*. If Secretary Wilbur was wrong, then he defeated a Congressional mandate extensively developed in reclamation law. Finally, in *Tallman* there was a consistent administrative practice, while here the Government has repudiated its former interpretation. The court therefore adopts the goal of determining whether Congress intended in the Project Act to apply acreage limitation to privately owned lands in the Imperial Valley.

This is the first stage of a bifurcated trial. Not included in this phase of the proceedings are the nature and extent of "present perfected rights" of the landowner-defendants, as that term is defined in the Supreme Court decree in *Arizona v. California*, 376 U.S. 340, 341, 84 S.Ct. 755, 11 L.Ed.2d 757 (1964), or the issue of whether the landowners have any "vested rights" to Colorado River water as against the United States.

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<sup>6</sup> *Udall v. Tallman, supra*, at p. 16, 85 S.Ct. at p. 801.

## V. THE STATUTORY LANGUAGE

Plaintiff contends that the Boulder Canyon Project Act is a reclamation project, and that §§ 1, 4(b), 12 and 14 incorporate general reclamation law, one portion of which is § 46 of the 1926 Omnibus Adjustment Act, 43 U.S.C. § 423e. The latter statute provides that no privately owned lands in excess of 160 acres shall receive water from a new project or new division of a project. Therefore, the acreage limitation must apply to private lands within the District.

Four sections in the Project Act advert to reclamation law. Section 1 provides that construction costs for the canal are to be reimbursable as provided in the reclamation law.

Section 4(b) of the Project Act instructs the Secretary to provide for revenues

“\* \* \* by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law \* \* \*”

Section 12 defines reclamation law as the 1902 Reclamation and Acts “amendatory thereof and supplemental thereto.”

Section 14, heavily relied on by plaintiff, states:

“This [Act] shall be deemed a *supplement to the reclamation law*, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, *except as otherwise herein provided.*” (emphasis supplied)

Plaintiff asserts that the phrase “construction, operation and management of the works” includes water delivery. Since § 46 of the 1926 Act was the most recent addition to reclamation law at the time the Project Act was passed, it applies to condition delivery of water upon compliance with acreage limitation.

Plaintiff continues by pointing out that §§ 1 and 4(b) of the Project Act require repayment contracts pursuant to reclamation law, and the only means of contracting in 1932 was in accordance with § 46 which required acreage limitation. Thus, the 1932 contract necessarily incorporated an acreage limitation applicable to private lands. Limited to these facts, plaintiff's theory of the statute is disarmingly simple.

Closer examination reveals, however, that the references to reclamation law are carefully qualified, most noticeably by the § 14 language that reclamation law applies "except as otherwise herein provided." And Congress has "otherwise provided" in § 5 that the Secretary may contract for storage and delivery of water.<sup>7</sup> Section 5 does not refer to reclamation law or acreage limitation, and this is the section where such reference would be most logical if water delivery is to be conditioned on acreage limitation. Where Congress has employed a term in one place and excluded it in another, it should not be implied in the section where it is excluded. *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 83 S.Ct. 358, 9 L.Ed.2d 466 (1963). The repayment provisions of § 4(b) are limited to expenses of construction, operation and maintenance; there is no mention in this section of water delivery.

Section 1 of the statute requires reimbursement for the main canal and auxiliary structures under reclamation law, but the clause immediately following this language,

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<sup>7</sup> Section 5 provides in part as follows:

"[That] the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof \* \* \* upon charges that will, \* \* \* in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this [Act] and the payments to the United States under subdivision (b) of Section 4."

"\* \* \* and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy \* \* \*," suggests that the reference to reclamation law merely establishes the principle expressly added, i.e., that the works are not to be paid for by the sale of power. Perhaps most damaging of all to plaintiff's case is the sentence next following:

"Provided, however, That no charge shall be made for water or for the use, storage, or delivery of water for irrigation \* \* \* in the Imperial or Coachella Valleys."

This express exemption from charges for water is one example of the distinction between water delivery and the concepts of reimbursement for project costs and the "construction, operation and maintenance" which is drawn throughout the statute. Other examples are found in Sections 8(a)<sup>8</sup> and 8(b).<sup>9</sup> This treatment hardly supports the conclusion that the phrase "construction, operation and maintenance" in § 14 includes water delivery.

In considering plaintiff's incorporation theory, an essential inquiry is whether § 46 is consistent with other terms of the Project Act. A comparison of section 4(b) of the Project Act with § 46 of the Omnibus Adjustment Act

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<sup>8</sup> Section 8(a) provides in part:

"The United States \* \* \* shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation \* \* \* and the storage, diversion, delivery, and use of water \* \* \*" (emphasis supplied)

<sup>9</sup> Section 8(b) provides in part:

"Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, *including* the appropriation, delivery, and use of water \* \* \* shall observe \* \* \* the terms of such compact." (emphasis supplied)

The use of the word "including" seems intended to emphasize the distinctions developed elsewhere.

reveals differences which point to a displacement of § 46 by the terms of the Project Act. Section 46 contracts are mandatory, while § 4(b) contracts are discretionary. Section 46 deals with both repayment and limitation on water delivery, but § 4(b) does not mention water delivery because § 5 covers that topic. And § 46 contracts must be executed before water delivery, while § 4(b) contracts are to be executed before money is appropriated. From this it appears that the only item in § 46 not expressly provided for in the Project Act is the acreage limitation, an issue of social policy and not mere technical details of contracting. It is unlikely that Congress would relegate an issue as important as acreage limitation for private lands to indirect inclusion. This belief is reinforced by § 9 of the Project Act, which expressly limits public land entries entitled to use project water to 160 acres. The absence of a similar provision for private lands indicates that Congress did not apply acreage limitation to private lands. If the Project Act did incorporate general reclamation law, then § 3 of the 1902 Act<sup>10</sup> would apply and the specific direction of § 9 would be unnecessary.

Plaintiff's contention that the 1932 contract between the Government and District was made pursuant to § 46 is unsupported. The contract at Article I recites that it was made pursuant to the 1902 Reclamation Act "and acts amendatory thereof or supplementary thereto \*\*\* and particularly pursuant to" the Project Act. Consequently, the contract could simply have been made pursuant to § 5 of the Project Act and § 1 of the 1922 Reclamation Act,

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<sup>10</sup> 43 U.S.C. §§ 416, 432, 434. This statute provides that public lands proposed for irrigation under reclamation projects shall be withdrawn and subject to entry under the homestead laws in tracts of not more than 160 acres.

43 U.S.C. § 511.<sup>11</sup> The mere existence of § 511 forecloses the argument that § 46 of the 1926 Act provided the only means of contracting for repayment in 1932 and indicates that if Congress had intended § 46 to apply, it would have so stated.

Finally, the Project Act contains a comprehensive set of provisions relating to the rights of prior appropriators of Colorado River Water under the Colorado River Compact. Section 6 of the Project Act names as the second use of the dam and reservoir the "irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact \* \* \*". Under the decree in *Arizona v. California* construing the Project Act, the application of a specific quantity of water to a defined area of land is an essential element of a perfected right.<sup>12</sup> It was held in the court's opinion that Secretary is required to satisfy present perfected rights.<sup>13</sup> This duty of the Secretary to supply water to an area where present perfected rights exist is repugnant to the concept that the United States may at the same time shut off water deliveries destined for lands, be they excess or not, entitled to the beneficial use of Colorado River water in the exercise of these rights.

Section 8(a) of the Project Act subjects the United States and all water users to the controlling effect of the Colorado River Compact and constitutes a recognition by

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<sup>11</sup> 43 U.S.C. § 511 provides that in carrying out the purposes of reclamation law, the Secretary may contract with irrigation districts for repayment of the costs, of construction, operation and maintenance of irrigation works. It also recites that no such contract will be binding on the United States "until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid."

<sup>12</sup> 376 U.S. 340, 341, 84 S.Ct. 755.

<sup>13</sup> 373 U.S. 546, at 566, 581, 584, 83 S.Ct. 1468, 10 L.Ed.2d 542.

Congress of the guarantee of present perfected rights found in Article VIII of the Colorado River Compact.

In Section 13 of the Project Act, the Colorado River Compact is approved. There is a second statement that the rights of the United States are controlled by the Compact, and the pre-project water rights are made covenants running with the land for the benefit of water users. These covenants are expressly made available to them for use in any litigation concerning Colorado River water.

The combined effect of §§ 6, 8(a) and 13 of the Project Act is to express Congressional intent that the present perfected rights be protected from interference by any contrary provision of the Project Act or reclamation law. The specific and repeated guarantees found in these sections indicate that any provision such as acreage limitation which would curtail such rights would be detailed in correspondingly exact language. Neither the references to reclamation law contained in §§ 1, 4(b), 12 and 14 of the Project Act, nor any other term thereof demonstrate Congressional intention that acreage limitation apply to privately owned lands in the District.

Two additional propositions urged by plaintiff merit consideration in construing the statutory language. First, it is contended that the Project Act created a federal subsidy; and that therefore the Act must be strictly construed against the grantees (defendants). *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). However, the Project Act set in motion a great project conferring many and important benefits on all parties involved, including the United States.<sup>14</sup>

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<sup>14</sup> A report of the Congress which passed the Project Act detailed the benefits to all parties and described the Project as a joint venture by necessity:

"Neither Imperial Irrigation District, the Coachella district, nor the United States could afford alone to build a canal from the river. Acting in conjunction, the canal is entirely feasible." Report No. 592, 70th Congress, March 20, 1928 at p. 21.

Among the national interests advanced by the Boulder Canyon Project are included:

- 1) The inclusion within the District by annexation, pursuant to Article 34 of the contract between the Government and the District dated December 1, 1932, of some 250,000 acres of Government lands.
- 2) Added capacity in the Canal for the servicing of such lands and some 11,000 acres of Indian land.
- 3) Flood control for the purpose of preserving the Laguna Dam and protecting the Yuma Reclamation Project as well as protecting the public lands and private interests in Imperial Valley.
- 4) The control of silt because of the federal government's problem in handling silt in the Yuma Project.
- 5) The need to build a canal on All-American soil to put the United States in a position to bargain with the Mexican Government over the use of the water of the Colorado River.
- 6) It enabled the United States Government to reclaim and put to use large tracts of public and Indian lands of the United States in Coachella Valley. Application of this rule of construction does not advance the search for acreage limitation in the Project Act.

In a related argument, plaintiff also contends that because there is no express exemption from the acreage limitations of reclamation law, the limitation must apply. In this matter, reliance is placed on the following statement in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 292, 78 S.Ct. 1174, 1184, 2 L.Ed.2d 1313 (1959):

"\* \* \* where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment."

The guidance afforded by this remark is of doubtful value in this case, because in *Ivanhoe* the legal issue was whether state law precluded applicability of acreage limitation. The case is also factually distinguishable in that one basic ingredient of the Imperial Valley situation, the guarantee of perfected rights by Congress, was wholly lacking in the *Ivanhoe* context.<sup>15</sup>

Finally, it appears that the practice, cited by plaintiff, of enacting express statutory exemptions did not come into vogue until 1938 with the Colorado-Big Thompson Project.<sup>16</sup> This was some ten years after passage of the Boulder Canyon Project Act.

## VI. LEGISLATIVE HISTORY

Secure in the belief that the statutory language clearly precludes an incorporation of acreage limitation, the court approaches legislative history with reluctance. The perils inhering in an imaginative recreation of the mind of Congress have been described by Mr. Justice Jackson, who termed the process a "psychoanalysis of Congress."<sup>17</sup> The language sought in the halls of Congress can usually be found in one place or another, and this is particularly true here, for the proceedings in Congress which culminated in the Project Act in 1928 spanned nearly a decade. However,

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<sup>15</sup> Indeed, it is doubtful whether the landowners before the court in *Ivanhoe* had any vested rights which Congress could have guaranteed. Certainly the landowners in the *Ivanhoe* District itself did not. See *Ivanhoe Irr. Dist. v. All Parties and Persons*, 47 Cal.2d 597, 654, 658, 306 P.2d 824 (Dis. op.); *Ivanhoe Irr. Dist. v. McCracken*, *supra*, 357 U.S. 275, 285, 78 S.Ct. 1174, 1180: "It is interesting to note that irrigators in this district receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right."

<sup>16</sup> 43 U.S.C. § 386.

<sup>17</sup> *United States v. Public Utilities Commission*, 345 U.S. 295, 319-320, 73 S.Ct. 706, 97 L.Ed. 1020 (1953).

the disagreement of experts in reclamation law, and the abrupt reversal of Departmental policy require some examination of legislative history for its teachings on Congressional intent.

The first Kettner Bill (H.R. 6044) in 1919 regarding construction of the Boulder Canyon Project did not contain an express provision for acreage limitation. In 1920, a second Kettner Bill (H.R. 11553) was introduced which contained a specific acreage limitation provision. It became apparent that more technical studies were needed before embarking on this ambitious project, and Congress in 1920 authorized a study which resulted in the comprehensive Fall-Davis Report.<sup>18</sup> The Report reaffirmed prior recommendations for an All-American Canal, and, based upon engineering studies of dam sites, recommended the construction of a high dam in Boulder Canyon.

Shortly after publication of the Report, Senator Hiram Johnson and Congressman Phil Swing introduced identical bills in the Senate and House proposing construction of an All-American Canal and a high dam near Boulder Canyon. These bills did not contain an express acreage limitation provision. Due to continuing controversy over dam sites, neither bill was reported out of committee during the 67th Congress.

When the 68th Congress convened, Senator Johnson and Congressman Swing again introduced identical bills, neither providing expressly for acreage limitation, but again neither bill was reported out of committee.

In the 69th Congress, Senator Johnson and Congressman Swing each introduced two more bills. During hearings in 1926 before the House Committee on Irrigation and Reclamation, the question arose whether either of the

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<sup>18</sup> Sen.Doc. 142 Problems of the Imperial Valley and Vicinity 67th Cong. 2nd Sess. (1922).

pending Swing Bills (H.R. 6251 and H.R. 9826) would make acreage limitations apply to private lands in the Imperial Valley. Congressman Swing and Dr. Elwood Mead, then Commissioner of the Bureau of Reclamation, both stated unequivocally that nothing in either of the bills would require a landowner to dispose of holdings in excess of 160 acres in order to receive water from the All-American Canal:

"**MR. SINNOTT.**<sup>19</sup> I would like to ask the doctor is there any provision in the bill sponsored by the Secretary on the farm unit on the lands to be irrigated?

"**DR. MEAD.** This bill does not go beyond the provisions for three things. One is the dam—the reservoir—and the second is the power plant, and the third is the All-American Canal. It does not deal with irrigation of new lands<sup>20</sup> at all.

"**THE CHAIRMAN.** [Congressman Addison T. Smith] That is reserved for future legislation?

"**DR. MEAD.** Yes, Sir.

"\* \* \*

"**MR. SINNOTT.** The present owner can occupy his present farm unit?

"**DR. MEAD.** Yes, sir.

"**MR. SINNOTT.** *No matter what that might be?*

"**DR. MEAD.** Yes.

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<sup>19</sup> Congressman Sinnott of Oregon.

<sup>20</sup> I. e., a "new" project, in the language of the Department. And § 46 of the 1926 Omnibus Adjustment Act, upon which plaintiff relies, only relates to "new" projects or "new divisions" of old projects.

"MR. SINNOTT. What is that now in the Imperial Valley?

"DR. MEAD. Of course, it varies widely. There is not any law. *There are a good many large holdings there.*

"\* \* \*

"MR. SINNOTT. There is nothing in this bill requiring the landowner to sell the surplus over a farm unit of 160 acres at a price to be fixed by the Secretary, as is now in the present reclamation law?

"MR. SWING. *no, sir.*" (emphasis supplied)<sup>21</sup>

After completion of the hearings, Congressman Leath-erwood of Oregon prevailed upon the committee to amend its print of H.R. 9826 by including an amendment requiring acreage limitation provisions in all contracts for the delivery of irrigation water.<sup>22</sup> H.R. 9826 was reported fa-vorably out of committee, was debated on in the House early in 1927, but was not voted upon.

On the Senate side, one of the Johnson bills, S. 3331, was also favorably reported out of committee, but a vote on this bill was blocked by a filibuster conducted by Senator Ashurst of Arizona. During the floor debates on this bill, Senator Phipps of Colorado offered two amendments which would have incorporated express acreage limitation requirements. Neither of these amendments was adopted.

While this third set of Swing-Johnson proposals did not contain specific acreage limitations provisions, it did refer to reclamation law, making the act a "supplement to the

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<sup>21</sup> Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation, 69th Congress, pp. 32-33 (1926).

<sup>22</sup> H.Rept. No. 1657 on H.R. 9826, 69th Cong. 2nd Sess. at pp. 29-30 (1926).

reclamation law, which said reclamation law shall govern the construction, operation, and maintenance of the works \* \* \*,<sup>23</sup> the predecessor of § 14 of the Project Act. The advice of Dr. Mead and Congressman Swing in Committee, and the proffered amendments containing express acreage limitation provisions must be read in conjunction with this § 14 language in the bills, language which plaintiff now contends incorporates the acreage limitation features of § 46 of the 1926 Act. The timing of these occurrences is deserving of interest, for this was the Congress which months earlier had passed the Omnibus Adjustment Act of 1926 and would presumably be most sensitive to the possibility of incorporating § 46 acreage limitation into the Project Act by means of the language which was to become § 14.

The 70th Congress saw the introduction of the fourth Swing-Johnson bills, and at the outset one striking development is noted. While all previous Swing-Johnson bills had been identical, now Congressman Swing's bill, H.R. 5773, contained a specific acreage limitation proviso, but Senator Johnson's bill, S. 728, did not contain any such limitation.

H.R. 5773 was reported favorably and was passed by the House after brief debate. In the Senate, Senator Ashurst proposed another bill, S. 1274, which expressly included acreage limitation. The Senate committee refused to take action on this bill and likewise failed to incorporate an amendment by Senator Ashurst to S. 728 which would have added acreage limitation. S. 728 was reported out of committee with a recommendation for passage,<sup>23</sup> but Senate debate on the measure was again bogged down in a filibuster by the Arizona Senator. At the beginning of the second session, the Senate undertook consideration of H.R. 5773 under the floor management of Senator Johnson.

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<sup>23</sup> S.Rept. 592 on S. 728, 70th Cong., 1st Sess., March 20, 1928.

Senator Hayden of Arizona had called attention to the discrepancy between the House and Senate versions in the matter of acreage limitation and proposed a corrective amendment. This amendment was not adopted. Senators Ashurst and Hayden on several occasions called attention to their rejected amendments and criticized the Senate bill for its lack of an acreage limitation applicable to private lands.<sup>24</sup>

The statements of Senators Phipps, Hayden and Ashurst recur too frequently and are too pointed to be disregarded. While the statements of opponents of a bill may not be authoritative, "they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticisms."<sup>25</sup>

In this session, Sen. Johnson moved to substitute S. 728 for H.R. 5773 so as to retain the enacting clause of H.R. 5773 and the text of S. 728, leaving the potential Act without an express acreage limitation provision. Senator Johnson advised the Senate that H.R. 5773 contained "like purposes and like designs" and that the substitution was offered to "preserve orderly legislative procedure." Unanimous consent to the substitution was obtained.<sup>26</sup>

This action is puzzling no matter how you read the completed statute with regard to acreage limitation. Plaintiff contends that because there was unanimous consent, with no complaint even from Senators Ashurst and Hayden, the Senate believed that acreage limitation was incorporated by the general references to reclamation law and that there was no real difference. However, the numerous

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<sup>24</sup> See e. g., 69 Cong. Rec. 9451.

<sup>25</sup> Arizona v. California, 373 U.S. 546, 583 n. 85, 83 S.Ct. 1468, 1489, 10 L.Ed.2d 542 (1963).

<sup>26</sup> 70 Cong. Rec. 67 (1928).

amendments proposed and the remarks during debate clearly show that Congress did not understand the two bills to be identical. Why someone on either side of the issue did not point to this significant difference is a question which probably cannot be answered now except by speculation.

To conclude the chronology, the Senate passed this version of the bill, and the House did likewise shortly thereafter. President Coolidge signed it into law on December 21, 1928.

There remains the question of why Congress desired to exempt these lands from acreage limitations when that policy had been a cornerstone of prior reclamation law. As noted in the discussion of the plain language of the statute, Congress enacted legislation recognizing prior rights to appropriation of Colorado River water which had been established by land cultivators in the Imperial Valley. The proceedings before Congress show that it was aware of the water rights held in Imperial Valley and that provisions of §§ 1, 6, 8, and 13 of the Project Act were designed to protect these rights from charges for water delivery and to insure that rights deriving from the Colorado River Compact would be recognized.<sup>27</sup> The steps taken to protect these rights were accomplished in recognition of the fact that the All-American Canal Project was not merely an arid lands reclamation project, but was a special purpose program designed for national purposes, including water negotiations with Mexico, as well as for regional agricultural development.

## VII. ADMINISTRATIVE PRACTICE

In construing a statute, weight must be given to interpretation placed on the statute by those charged with its

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<sup>27</sup> See, e. g., Remarks of Senator King in 70 Cong. Rec. 528; Remarks of Senator Johnson 70 Cong. Rec. 233.

administration. *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). See also *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1964). Respect for administrative interpretation is particularly appropriate when the administrative practice involves a " 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 77 L.Ed. 796 (1933)." *Power Reactor Development Co. v. International Union of Electrical Radio and Machine Workers*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961).

After consultations within the Department, Secretary Wilbur on February 24, 1933, advised the Imperial Irrigation District by letter that the acreage limitation of reclamation law did not apply to private lands in the Imperial Valley. This letter stated in pertinent parts as follows:

"Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested rights recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.

In connection with the activities of the Bureau of Reclamation it has been held that the provisions of section 5 of the reclamation act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recog-

nition of a vested water right for a larger area, and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. (Opinion of Assistant Attorney General, 34 L.D. 351; Anna M. Wright, 40 L.D. 116). On many projects it has been the practice to recognize vested rights in single ownership in excess of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project, and others."

Pursuant to Article 31 of the December 1, 1932, contract, judicial proceedings for the confirmation of the contract were instituted in the California Superior Court for Imperial County, sub nom. Hewes v. All Persons. (Civil No. 15460, unreported, 1933). The United States was not named a party but was kept advised of all steps in those proceedings and furnished with copies of all pleadings and papers filed therein. There was directly raised in the pleadings the question as to whether the 160-acre limitation had application to privately owned lands within the District. At no time did the United States voice opposition to the proposition urged in the litigation that the 160-acre limitation did not apply to landholdings within the District, either by intervening in said action, appearing therein as *amicus curiae* or otherwise.

The decision in said cause of Hewes v. All Persons upheld the authorization for and the validity of the December, 1932 contract, as written, i. e., as being a contract which, consistently with the knowledge and intent of the parties thereto, contained no clause or provision having the effect of imposing the 160-acre limitation upon private landholdings within the District. The decision expressly held that the acreage limitation had no application to privately owned lands within the District. At all times during the construction of the All-American Canal and thereafter, the United States was aware of the holdings of the Su-

rior Court. During the years when the All-American Canal was being constructed, no one in the Bureau of Reclamation or Department of the Interior suggested at any time that the acreage limitation was or should be applicable to the Imperial Valley.

In 1941, B. P. King, an attorney in the Bureau of Reclamation was authorized by Commissioner of Reclamation, W. J. Bunks, under instructions of the Secretary of the Interior, Harold L. Ickes, to make a comprehensive study of the excess land law. Pursuant to these directions, a report was filed in the same year entitled "The Excess Land Provision of the Federal Reclamation Law." In the report, Mr. King gave consideration specifically to the All-American Canal. Mr. King concluded that the excess land provisions of federal reclamation law were not applicable to the Imperial Valley.

In 1942, the General Counsel for the Federal Land Banks at Berkeley raised the question as to whether the 160-acre limitation was applicable to privately owned lands within the Imperial Irrigation District, Imperial County, California. The officials of the Federal Land Bank at Berkeley were informed by the Bureau of Reclamation that the limitation did not apply to such lands.

In 1946, the Bureau of Reclamation published its "Land-ownership Survey on Federal Reclamation Projects." This survey reflected no excess land acreage in the Imperial Valley.

Perhaps the most serious challenge to the administrative policy initiated by the Wilbur letter arose in 1944-1945 in connection with negotiations for a supplemental repayment contract to be entered into between the United States and the Coachella Valley County Water District. Solicitor of the Department Fowler Harper rendered an opinion<sup>28</sup> on May 31, 1945, stating that Section 14 of the

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<sup>28</sup> 71 Decisions of the Department of the Interior 496 Appendix H at p. 533.

Project Act carried into operation the acreage limitation provisions of reclamation law and that acreage limitation should be incorporated in the Coachella contract. He noted that the Wilbur letter was limited to Imperial Valley, but he criticized it on the basis that it disregarded all other excess-land provisions except section 5 of the 1902 Reclamation Act.

Following approval of the opinion by Secretary Ickes, a supplemental contract was executed on December 27, 1947, which imposed acreage limitations in the Coachella Valley. Compliance was voluntary on the part of the Coachella District, and no litigation on the issue ensued. Whether this acceptance was in recognition of the correctness of the ruling or merely reflective of the fact that there were few excess land holdings is unknown.

The Department was left in the seemingly anomalous position of enforcing acreage limitation in Coachella Valley under the Project Act while allowing excess land holdings in the Imperial Valley. It will be recalled that section 1 of the Project Act prohibits charges for the "use, storage or delivery of water \* \* in the Imperial or Coachella Valleys." This apparently contradictory state of affairs was called to the attention of Secretary Krug in 1948. In a letter to H. C. Hermann of the Veterans of Foreign Wars, commenting on this situation, the Secretary noted that as a technical matter the Harper opinion applied only to Coachella Valley. He further stated:

"Concerning, however, the substantive questions which relate alike to both districts, we have concluded that inasmuch as the Secretary of the Interior then charged with the administration of law construed the acreage limitation as not being applicable to lands of the Imperial Irrigation District under the facts as he then understood them, and it being clear that the then owners and subsequent purchasers of irrigable lands in the Imperial Irrigation District were entitled to reply upon advice from the Secretary and thus establish an economy in the district consistently with that

advice, they should not now be abruptly advised that the economy of the project is to be changed under a contrary ruling of the present officer charged with the administration of the law.

*To the extent, therefore, that the actual fact situation with respect to lands and water rights may be identical in the two districts in question, and to the extent that the advice furnished in the Coachella case would otherwise be applicable in the Imperial case, we feel that we must allow that inconsistency, if such there be, to continue. I think that you will understand the position which the Department must take in this matter in fairness to those who have relied on its action, even though that action might now be subject to valid question.*" (emphasis supplied)

While the Secretary based his reluctance to press the Imperial matter further on considerations of fairness to those who had long relied on the Wilbur letter, he studiously avoided conceding that an inconsistency existed because Solicitor Harper himself was not informed of the status of water rights in the two districts. In his opinion, Solicitor Harper states:

"Although the language of the letter of Secretary Wilbur seems broad enough to include the Coachella Valley District lands, the letter was clearly intended only to apply to the Imperial Irrigation lands. It apparently assumes that all privately owned land in the District was under irrigation and has a vested water right. Nothing in the files indicates whether such is the factual situation, and there is strong indication that the Coachella Valley lands are to a very large degree as yet not irrigated."

There was of course ample data then available to show that in Imperial Valley there were in excess of 400,000 acres receiving pre-project irrigation in reliance on rights to Colorado River water. The major weakness of the Harper decision as it relates to Imperial Valley is its failure to deal with this question of pre-project water rights. There was much discussion of how section 14 of the Project Act

made that act a supplement to reclamation law, but no discussion of Congressional recognition of pre-existing rights under the Colorado River Compact found in sections 6, 8, and 13 of the Project Act. As has been noted in the discussion of statutory language, there is no inconsistency between a prohibition on charges for the use, storage and delivery of water and an acreage limitation provision, but there is such an inconsistency between recognizing the pre-existing rights and enforcing acreage limitation. The extent of pre-project development is the heart of the difference between the Imperial and Coachella situations, and this is why Secretary Krug's statement of what he would do if an inconsistency existed at that time does not represent serious and informed criticism of the Wilbur policy. That it was even less a rejection of that policy is evidenced, in part, by the negotiation in 1952 of a supplemental contract with the Imperial Irrigation District which made no mention of acreage limitation.<sup>29</sup> In Article 17 the supplemental contract reaffirmed the contract of December, 1932. Such reaffirmance expressly continued in effect the 1932 covenants with reference to the satisfaction of perfected rights, the controlling effect of the Colorado River compact and the other provisions of the 1932 contract earlier mentioned herein.

On February 5, 1958, Solicitor Bennett of the Department of the Interior wrote the Solicitor General of the Department of Justice in connection with the then pending

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<sup>29</sup> Former Solicitor of the Department Edward Weinberg, who participated in these contract negotiations, testified that the Department had considered including an acreage limitation clause in the contract, but that this item was dropped because the Department was then preoccupied with the problem of treaty commitments to Mexico for delivery of water. Also, it was recognized that the District would not have signed a contract incorporating acreage limitation. After considering these factors, the Department was of the opinion that inclusion of acreage limitation for private lands would be "counter-productive."

case of *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, and the question posed by Arizona in the oral argument therein as to whether the 160-acre limitation was applicable to the lands of the Imperial Irrigation District. Solicitor Bennett stated:

*"The water contract between the United States and the Imperial Irrigation District was executed December 1, 1932, some 25 years ago. The negotiations leading to the contract were lengthy and extensively in the public view. Except at the time of court confirmation, I am not aware of any challenge as to the legality of the contract during this entire period. Water has been delivered to the lands of Imperial District pursuant to the contract since the early 1940's. I am not aware that any administrative action has been proposed or taken either by the preceding administration or by this one to recognize or enforce application of the 160-acre limitation to the lands of the Imperial Irrigation District.*

*"The United States acting through the then Secretary of the Interior accepted the contract as having been confirmed and acting thereon proceeded to initiate construction of the All-American Canal and engage upon a variety of transactions in reliance upon the validity of the contract. There must surely arise a point of time, again I believe long since past, when the contract in keeping with the terms of Article 31 became binding upon the United States and the District. To treat otherwise at this date could have far-reaching effect."* (emphasis supplied)

This history of the administrative practice has necessarily been selective, but a thorough review of Departmental policy has failed to disclose a departure from the interpretation initiated by Secretary Wilbur until 1964. This interpretation was followed during the incumbencies of six successor Secretaries and four Presidential administrations.<sup>30</sup> From time to time during the period 1933-

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<sup>30</sup> Secretary Ickes under Presidents Roosevelt and Truman; Secretaries King and Chapman under President Truman; Secre-

1964, a few individual members of the Department expressed doubt as to the validity of the Wilbur opinion, but these doubts never crystallized into an official repudiation. The Supreme Court commented on a similar situation in *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473, 35 S.Ct. 309, 313, 59 L.Ed. 673 (1915):

"It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,—even when the validity of the practice is the subject of investigation."

### VIII. CONGRESSIONAL KNOWLEDGE AND APPROVAL OF THE WILBUR INTERPRETATION

The failure of Congress to revise a statute or take other affirmative action with respect to an administrative interpretation of a statute is often competent evidence that the interpretation is congruent with the legislative design. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796 (1933). *Cf. Red Lion Broadcasting Co., Inc. v. Federal Communication Commission*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed. 2d 179 (1965).

Congress for more than 30 years was fully aware of the 1933 ruling and interpretation of Secretary Wilbur and of

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ties McKay and Seaton under President Eisenhower. During his tenure under President Kennedy, Secretary Udall did not disturb the interpretation.

the administrative practice predicated thereon. The Imperial Valley situation in light of such interpretation and practice was called to its attention in appropriation hearings for the construction and operation of the All-American Canal, at the hearings on the Central Valley and San Luis projects and at the hearings on the Small Projects Act of 1958.

Beginning in 1943, efforts were made in Congress to exempt the Central Valley Project of California from the acreage limitation. These attempts generated a fierce debate over the basic policy of land limitation, which continued for more than three years. In the end, advocates of the 160-acre limitation were successful as regards its application to Central Valley. While the inapplicability of the acreage law to Imperial Valley was repeatedly cited to Congress, the validity of that position went unchallenged. On the contrary, the Bureau of Reclamation never flagged in its support of the Wilbur ruling. Typical is the testimony of Assistant Commissioner Warne before a Subcommittee of the Senate Commerce Committee in connection with the Omnibus Rivers and Harbors bill of 1944:

“Representative ELLIOTT: Why was the limitation lifted in the Southern part of California down in the Imperial Valley? Why was the 160-acre limitation lifted? That applied there, just the same as it did elsewhere.

“MR. WARNE: No, there was never a 160-acre limitation applied to the Imperial Valley.

“Representative ELLIOTT: It came under the same Act, the Act of 1902.

“MR. WARNE: No, I am sorry, I think you will find that the Boulder Canyon Act authorized the All-American Canal, and that the provision did not apply there except as to public lands \* \* \*.<sup>31</sup>

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<sup>31</sup> Hearings on H.R. 3961, before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., Part IV, page 599 (1944).

In addition to the foregoing, copies of the Bureau of Reclamation's excess land surveys of 1946 and 1964 were filed with Congress.

At no time from 1933 to the present has Congress taken any action in derogation of the propriety of the Wilbur interpretation or of the long standing administrative practice which followed it.

It has been observed that to attribute significance to the inaction of Congress is often a "shaky business."<sup>32</sup> In this case, however, some weight must attach to this knowing inaction. Congress would hardly have ignored the Department's failure to enforce an important provision of reclamation law. *Accord, United States v. Gerlach Livestock Co.*, 339 U.S. 725, 735-736, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

The court accordingly holds that the defendant Imperial Irrigation District is not bound by the land limitation provisions of reclamation law in the delivery of Colorado River water to any of the privately owned lands within the boundaries of Imperial Irrigation District.

The court further holds that the land limitation provisions of reclamation law have no application to privately owned lands lying within the Imperial Irrigation District.

Counsel for defendants may present an appropriate judgment.

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<sup>32</sup> *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408-409, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1960).

**APPENDIX E**

United States District Court Southern District of California

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UNITED STATES OF AMERICA,

*Plaintiff,*

v.

IMPERIAL IRRIGATION DISTRICT,  
a corporation,

*Defendant.*

JOHN M. BRYANT, et al.,

*Landowner defendants,  
both individually and on  
behalf of members of a  
class, to wit, all persons  
owning more than 160  
acres of irrigable land  
within the Imperial Irriga-  
tion District,*

STATE OF CALIFORNIA,

*Intervening Defendant.*

BEN YELLEN, et al.,

*Applicants for Intervention.*

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**CIVIL NO. 67-7-T**

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March 29, 1971

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**ORDER DENYING APPLICANTS' MOTION TO  
INTERVENE**

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This cause came on regularly for hearing before the court on the application of Ben Yellen et al. to intervene of right pursuant to Rule 24(a)(2); the United States of America appearing by Assistant United States Attorney, Raymond Zvetina; Imperial Irrigation District appearing by R. L. Knox, Jr; John M. Bryant, et al, appearing by O'Melveny & Myers, Pierce Works and Charles W. Bender; State of California, intervenor, appearing by Deputy Attorney General Neil Gobar; and Ben Yellen, et al by Arthur Brunwasser. Applicants for intervention have moved for an order permitting intervention; for leave of court to take the deposition of Mr. David Warner, Chief of Litigation, Lands and Natural Resources Division, Department of Justice; and for an order staying implementation of the judgment entered on February 9, 1971, until ten days after the ruling on these pending motions. The motion to stay implementation of the judgment is hereby ordered denied because there will be no delay in the issuance of the court's ruling. The motion for leave to take the deposition of Mr. David Warner is denied because there is no showing of the necessity therefor. The United States has no duty to disclose its decision concerning appeal during the sixty-day period within which an appeal may be taken.

The court finds that the application to intervene is timely made. Intervention after judgment is permissible if there is no substantial prejudice to the other parties. This litigation is now in its fourth year, and the limited nature of the participation sought, that of appeal, does not disturb the prior proceedings.

All of the defendants assert that the judgment in the 1933 case of *Hewes v. All Persons* (Civil No. 15460, Superior Court, Imperial County, California) is *res judicata* as to the applicants for intervention. Proceedings in the *Hewes* case were instituted pursuant to Article 31 of the December 11, 1932 contract between the United States and the Imperial Irrigation District and § 511 of Title 43 of the United States Code. The object of the suit was to

determine the validity of the 1932 contract. In this action the question of whether the 160-acre limitation had application to privately owned lands within the District was litigated, and it was held there that the acreage limitation did not apply.

It appears that this proceeding *in rem* was intended to and did bind all persons claiming any right, title or interest in property located within the Imperial Irrigation District and that accordingly the intervention is precluded as a collateral attack upon a judgment entitled to full faith and credit.

However, regardless of the effect of the *Hewes* decision, it is incumbent upon the applicants to demonstrate "an interest relating to the property or transaction which is the subject of the action." Rule 24(a)(2) Federal Rules of Civil Procedure. The interest supporting intervention has been described as a "direct, substantial, legally protectible interest in the proceedings." *Hobson v. Hansen*, 44 F.R.D. 18 (1968) The applicants here assert that they desire to buy excess land which may be sold if the government ultimately prevails in this lawsuit and is able to enforce acreage limitation in the Imperial Irrigation District, but this "interest" is no greater than that possessed by the general public. Several specific factors in this case illustrate how extremely speculative and remote is the interest asserted here. Before any possible sale of excess lands, the initial decision in the first phase of the lawsuit must be reversed on appeal. If this occurs, then there will be a second lengthy trial concerning the nature and extent of the landowner defendants' vested rights to Colorado River Water. If the government prevailed in that phase, a plan for disposition would have to be proposed and executed. In all probability, there would be some recognition of the added value of the land due to the efforts of the current landowners. Applicants have shown no present ability to purchase and no prior offers within the past twenty years to purchase farm land in the Imperial Valley at market

value. Because this is not a class action intervention, the capability of the named applicants to purchase the lands they desire is material. Furthermore, the requirement of reclamation law for recordable contracts to be approved by the Secretary of the Interior is in no way inconsistent with the customary and usual right of a seller to choose his purchaser. Finally, if the Secretary of the Interior were able to take a more active role in the disposition of excess lands, there would quite likely be a veterans' preference for entry which would put a large class ahead of the present applicants. Cf. 43 U.S.C. §§ 186, 279.

It is also required that the interest of applicants for intervention be inadequately represented by existing parties. The court has observed the vigorous representation by counsel for United States in urging that acreage limitation applies in the Imperial Irrigation District and finds that the interest of applicants, if any, has heretofore and is now being adequately represented by plaintiff.

Accordingly, it is ordered that the motion for leave to intervene be, and the same hereby is, denied.

DATED: March 29, 1971.

/s/ Howard B. Turrentine  
United States District  
Judge

**APPENDIX F**  
Relevant Portions of the 1964 Decree in  
*Arizona v. California*

[376 U.S. 340] **ARIZONA v. CALIFORNIA ET AL.**  
No. 8, Original. Decided June 3, 1963.—Decree entered  
March 9, 1964

Decree carrying into effect this Court's opinion of June 3, 1963, 373 U.S. 546.

**IT IS ORDERED, ADJUDGED AND DECREED THAT**

**I. For purposes of this decree:**

\* \* \* \* \*

(D) "Regulatory structures controlled by the United States" refers to Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Dam, Imperial Dam, Laguna Dam and all other dams and works on the mainstream now or hereafter controlled or operated by the United States which regulate the flow of water in the mainstream or the diversion of water from the mainstream;

(E) "Water controlled by the United States" refers to the water in Lake Mead, Lake Mohave, Lake Havasu and all other water in the mainstream below Lee Ferry and within the United States;

\* \* \* \* \*

(G) "Perfected right" means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;

(H) "Present perfected rights" means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act;

\* \* \* \* \*

II. The United States, its officers, attorneys, agents, and employees be and they are hereby severally enjoined:

(A) From operating regulatory structures controlled by the United States and from releasing water controlled by the United States other than in accordance with the following order of priority:

- (1) For river regulation, improvement of navigation, and flood control;
- (2) For irrigation and domestic uses, including the satisfaction of present perfected rights; and
- (3) For power;

\* \* \* \* \*

(B) From releasing water controlled by the United States for irrigation and domestic use in the States of Arizona, California, and Nevada, except as follows:

(1) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy 7,500,000 acre-feet of annual consumptive use in the aforesaid three States, then of such 7,500,000 acre-feet of consumptive use, there shall be apportioned 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada;

(2) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use in the aforesaid States in excess of 7,500,000 acre-feet, such excess consumptive use is surplus, and 50% thereof shall be apportioned for use in Arizona and 50% for use in California; provided, however, that if the United States so contracts with Nevada, then

46% of such surplus shall be apportioned for use in Arizona and 4% for use in Nevada;

(3) If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre-feet be apportioned for use in California including all present perfected rights;

\* \* \* \* \*

(5) Notwithstanding the provisions of Paragraphs (1) through (4) of this subdivision (B), mainstream water shall be released or delivered to water users (including but not limited to public and municipal corporations and other public agencies) in Arizona, California, and Nevada only pursuant to valid contracts therefor made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act or any other applicable federal statute;

\* \* \* \* \*

**APPENDIX G**

No. 8, Orig.

**STATE OF ARIZONA, Plaintiff,**

*v.*

**STATE OF CALIFORNIA et al.**

**On Joint Motion to Enter Supplemental Decree and  
Motions for Leave to Intervene.**

**[January 9, 1979]**

**PER CURIAM**

The United States of America, Intervenor, State of Arizona, Complainant, the California Defendants (State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, County of San Diego), and State of Nevada, Intervenor, pursuant to Art VI of the Decree entered in the case on March 9, 1964, at 376 US 340, and amended on February 28, 1966, at 383 US 268, have agreed to the present perfected rights to the use of mainstream water in each State and their priority dates as set forth herein. Therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that the joint motion of the United States, the State of Arizona, the California Defendants, and the State of Nevada to enter a supplemental decree is granted and that said present perfected rights in each State and their priority dates are determined to be as set forth below . . . .

\* \* \* \* \*

*The Imperial Irrigation District in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.*

## APPENDIX H

## CALIFORNIA, IN AND FOR THE COUNTY OF IMPERIAL.

IN THE MATTER OF THE VALIDATION OF )  
 A CONTRACT, DATED DECEMBER 1, 1932, )  
 ENTITLED "CONTRACT FOR CONSTRUCTION )  
 OF DIVERSION DAM, MAIN CANAL AND )  
 APPURTEnant STRUCTURES, AND FOR )  
 DELIVERY OF WATER" BETWEEN THE )  
 UNITED STATES OF AMERICA AND IM- )  
 PERIAL IRRIGATION DISTRICT, THE EXE- )  
 CUTION OF WHICH WAS AUTHORIZED AT )  
 AN ELECTION HELD IN SAID DISTRICT ON )  
 THE 12TH DAY OF JANUARY, 1933. )

No. 15460

EVAN T. HEWES, IRA ATEN, WILLIAM E. YOUNG, )  
 BURLEIGH ADAMS, AND MARK ROSE, AS AND CON- )  
 STITUTING THE BOARD OF DIRECTORS OF IMPERIAL )  
 IRRIGATION DISTRICT AND IMPERIAL IRRIGATION )  
 DISTRICT, )

Plaintiffs.

—vs—

ALL PERSONS, INCLUDING ALL THOSE IN ANY WAY )  
 INTERESTED OR TO BE INTERESTED IN THAT CERTAIN )  
 CONTRACT, DATED DECEMBER 1, 1932, ENTITLED, )  
 "CONTRACT FOR CONSTRUCTION OF DIVERSION )  
 DAM, MAIN CANAL AND APPURTEnant STRUC- )  
 TURES, AND FOR DELIVERY OF WATER," BETWEEN )  
 THE UNITED STATES OF AMERICA AND IMPERIAL )  
 IRRIGATION DISTRICT, THE EXECUTION OF WHICH )  
 WAS AUTHORIZED AT AN ELECTION HELD IN SAID )  
 DISTRICT ON THE 12TH DAY OF JANUARY, 1933, )  
 AND ALL THOSE HAVING OR CLAIMING ANY RIGHT, )  
 TITLE OR INTEREST IN OR LIEN OR CLAIM UPON THE )  
 PROPERTY WITHIN SAID DISTRICT OR ANY PART )  
 THEREOF, AND ALL REAL PROPERTY WITHIN SAID )  
 DISTRICT. )

Defendants. )

## FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause came on regularly for trial, and was tried at the Court Room of the above entitled Court in the City of El Centro, County of Imperial, State of California, commencing on the 16th. day of March, 1933, before the Court sitting without a jury, a jury trial having been waived, Hon. Emmet H. Wilson, Judge presiding, upon the complaint, the demurrer and answer of the defendants. Coachella Valley County Water District, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre, and upon the answer of the defendant Charles Malan. Chas. L. Childers and D. B. Roberts, of El Centro, California, appearing as counsel for the plaintiffs; and W. G. Irving of Riverside, California, and Stewart, Shaw and Murphey of Los Angeles, California, appearing as counsel for Coachella Valley County Water District; A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre, and M. W. Conkling, of San Diego, California, appearing as counsel for Charles Malan; that summons herein was duly and properly issued as provided by law, and was served upon all defendants in the manner provided by law, and the order of this Court duly and properly made, by publication thereof in Imperial Valley Press, a newspaper of general circulation published in the County of Imperial where this action was and is pending, said paper having been designated by order of this Court, for at least once a week for three weeks, and that the time within which the defendants or any of them are by law authorized to appear in said cause and answer or otherwise plead therein, to wit, ten days after the full publication of said summons, as above stated, had fully expired, and no defendant having appeared herein, except the defendants Coachella Valley County Water District, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones, Washington McIntyre and Charles Malan, the default of all of the defendants except those defendants hereinabove named and who had appeared herein was duly and regularly entered by

order of this Court. Upon suggestion to the Court that the term of office of the plaintiff John L. DuBois had, subsequently to the commencement of said action and prior to the trial thereof, expired and Even [sic] T. Hewes had been elected as Director of Imperial Irrigation District to succeed the said John L. DuBois and had duly qualified as such director, and that the term of office of the plaintiff W. O. Blair had expired subsequently to the commencement of said action and prior to the trial thereof, and that William E. Young had been elected as Director of Imperial Irrigation District to succeed the said W. O. Blair and had duly qualified as such director, upon motion of counsel for the plaintiffs, and good cause appearing therefor and there being no objection thereto it was ordered that Even [sic] T. Hewes be substituted as party plaintiff for and instead of the plaintiff John L. DuBois and that William E. Young be substituted as party plaintiff for and instead of the plaintiff W. O. Blair; that the demurrer of the defendants Coachella Valley County Water District, A. B. Cliff, John L. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre was thereupon presented to and fully considered by the Court and after hearing the argument of counsel was taken under submission and thereupon said cause proceeded to trial upon said complaint and answers and evidence, both oral and documentary, was offered by the respective parties and received by the Court and the evidence having been closed and the Court having heard the arguments of Counsel and being fully advised in the premises makes and files its Findings of Fact and Conclusions of Law, constituting the Court's decision in said cause as follows:

#### FINDINGS OF FACT.

##### FINDING NO. 1.

That each and all of the allegations of the plaintiffs' complaint are true.

## FINDING NO. 2.

That Imperial Irrigation District is and ever since on or about the 25th. day of July, 1911, has been an irrigation district duly and regularly organized and existing under and by virtue of the California Irrigation District Act, approved March 31, 1897, and the acts amendatory thereof and supplementary thereto and that said irrigation district is situated entirely within the County of Imperial, State of California, and is now, and at all times since on or about July 25, 1911, has been acting as and exercising the rights of an irrigation district under the laws of the state of California, and that the boundaries of said Imperial Irrigation District have not been changed since prior to July 1, 1931.

## FINDING NO. 3.

That at the date of the commencement of this action John L. DuBois, Ira Aten, W. O. Blair, Burleigh Adams and Mark Rose were and ever since prior to July 1, 1932, had been the duly elected or appointed qualified and acting directors of said Imperial Irrigation District and that during said time constituted the Board of Directors of said Imperial Irrigation District and the whole of said board of directors and that during all of said time the said John L. DuBois was the duly elected, qualified and acting President of said Board of Directors of Imperial Irrigation District, and that during all of said time F. H. McIver was the duly appointed, qualified and acting Secretary of the Board of Directors of Imperial Irrigation District and that during all of said time the office of said Board of Directors had been located in the city of El Centro, County of Imperial, State of California, which office had been and was the usual and regular place of meeting of said Board of Directors.

**FINDING NO. 4.**

That prior to December 5, 1932, there was presented to Imperial Irrigation District and to its Board of Directors as hereinabove found, a proposed contract entitled "Contract for the Construction of Diversion Dam, Main Canal, and appurtenant structures and for Delivery of Water", between the United States of America and Imperial Irrigation District for the construction of a diversion dam in the main stream of the Colorado River and a Main Canal and appurtenant structures located entirely within the United States connecting said diversion dam with the Imperial and Coachella Valleys in California, and for the repayment of the cost thereof as provided in the Reclamation Law. Said proposed contract as executed as alleged in the plaintiffs' complaint being the same contract, a true and correct copy of which is attached to the plaintiffs' complaint marked Exhibit "A" and by reference thereto made a part of said complaint.

**FINDING NO. 5.**

That said proposed contract was signed and executed as provided by law, by the United States of America acting for that purpose by Ray Lyman Wilbur, Secretary of the Interior on the 1st day of December, 1932.

**FINDING NO. 6.**

That on the 5th. day of December, 1932, at a regular adjourned meeting of the Board of Directors of Imperial Irrigation District duly and regularly held on said day at the usual and regular place of meeting of said Board of Directors at least three members thereof being present and voting therefor, the said Board of Directors by resolution apprcved the said proposed contract as to form.

**FINDING NO. 7.**

That after said Board of Directors had approved said proposed contract as to form as hereinabove found and on

the same day, to-wit, on the 5th. day of December, 1932, and at the same meeting of said Board of Directors and at the same place, at least three members of said Board being present and voting therefor, by resolution directed the Secretary of said Board of Directors to submit the proposal to enter into said contract with the United States, as embodied in said proposed contract, with such plans and estimates of cost as had been made in connection therewith to the State Engineer of the State of California, for his examination and report as provided by law.

#### FINDING NO. 8.

That thereafter and on the same day, towit, on the 5th. day of December, 1932, the Secretary of the Board of Directors of Imperial Irrigation District, agreeable to the resolution of said Board last above found, did submit said proposal to enter into contract with the United States as embodied in said proposed contract, together with such plans and estimates of cost as had been made in connection therewith, to wit, the engineering report of H. J. Gault, in evidence as Plaintiffs' Exhibit No. 4 to the State Engineer of the State of California, for his examination and report.

#### FINDING NO. 9.

That thereafter the State Engineer of the State of California, did make an examination of said proposal as embodied in said proposed contract and of the plans and estimates of cost as had been made in connection therewith and thereafter and on towit, the 14th. day of December, 1932, the said State Engineer did make his report thereon as provided by law in writing to the Board of Directors of Imperial Irrigation District and in said report approved said proposal as embodied in said proposed contract and the plans and estimates of cost as had been made in connection therewith and among other things found and declared that the water supply is ample, that the project is physically feasible, and can be constructed within the estimated cost, the land is susceptible of irrigation, the cost

will be justified by the benefits, and that the project as a whole is financially and economically sound and thereafter and on the 19th. day of December, 1932, filed said report and approval with the Secretary of the Board of Directors of Imperial Irrigation District.

**FINDING NO. 10.**

That on towit the 5th. day of December, 1932, the Board of Directors of Imperial Irrigation District at a regular adjourned meeting of said Board duly and regularly held on said day at the usual and regular place of meeting of said Board at least three members thereof being present and voting therefor did by resolution direct the Secretary of said Board of Directors to submit the said proposal to enter into a contract with the United States as embodied in said proposed contract with such plans and estimates of cost as had been made in connection therewith to the California Districts Securities Commission for its examination and report.

**FINDING NO. 11.**

That thereafter and on the same day, towit, on the 5th. day of December, 1932, the Secretary of the Board of Directors of Imperial Irrigation District, agreeable to the resolution of said Board of Directors last above found, did submit said proposal to enter into contract with the United States as embodied in said proposed contract, together with such plans and estimates of cost as had been made in connection therewith to the California Districts Securities Commission for its examination and report.

**FINDING NO. 12.**

That thereafter the California Districts Securities Commission made its examination of said proposal as embodied in said proposed contract and of said plans and estimates of cost as had been made in connection therewith and thereafter and on the 16th. day of December, 1932, did make its report thereon as provided by law in writing to

the Board of Directors of Imperial Irrigation District and in and by the terms of said report approved said proposal as embodied in said proposed contract and the plans and estimates of cost as had been made in connection therewith and among other things found and declared that the supply of water available to the District now and as it may be enlarged under said contract is and will be ample, that the soil is fertile and susceptible to irrigation, that the plans and estimates of cost prepared in connection with the contemplated works and submitted to the said commission are adequate and that the cost will not exceed such estimate, that the project is feasible and for the best interest of said District, and thereafter and on the 19th day of December, 1932, filed said report and approval with the Secretary of the Board of Directors of Imperial Irrigation District.

#### FINDING NO. 13.

That plans and estimates of cost were made in connection with the proposal of said Imperial Irrigation District to enter into said proposed contract with the United States and consists of an engineering report by H. J. Gault dated May, 1931, and transmitted May 14, 1931, to the Chief Engineer of the Bureau of Reclamation at Denver, Colorado, a copy of said engineering report having been offered in evidence by the plaintiffs and received by the Court and marked Plaintiffs' Exhibit No. 4, and that said plans and estimates of cost were made pursuant to the terms of a cooperative contract, dated March 26, 1929, between Imperial Irrigation District, Coachella Valley County Water District and the United States of America acting for that purpose through Elwood Mead, Commissioner, Bureau of Reclamation, and that said plans and estimates of cost as embodied in said engineering report was approved by the Board of Directors of Imperial Irrigation District by resolution at a regular adjourned meeting of said Board duly and regularly held on the 29th day of November, 1932, at

the usual and regular place of meeting of said Board at least three members thereof being present and voting therefor and that said plans and estimates of cost as embodied in said engineering report are the same plans and estimates of cost submitted with said proposal as embodied in said proposed contract by the Secretary of the Board of Directors of said District to the State Engineer of the State of California and to the California Districts Securities Commission as hereinabove found.

FINDING NO. 14.

That on the 19th. day of December, 1932, the Board of Directors of Imperial Irrigation District at a regular adjourned meeting of said Board of Directors duly and regularly held on said day at the usual and regular place of meeting of said Board, at least three members thereof being present and voting therefor did by resolution determine and declare that the proposed plan of works as embodied in said proposed contract and in the said plans and estimates of cost made in connection therewith as herein last above found was satisfactory and that the project was feasible and that it was for the best interest of said Imperial Irrigation District and the land owners and assessment payers and water users thereof that said proposed contract be entered into and executed by Imperial Irrigation District and that it was thereby proposed by said Board of Directors that Imperial Irrigation District enter into and execute said proposed contract, upon the execution thereof being authorized by the qualified electors of Imperial Irrigation District as provided by law.

FINDING NO. 15.

That thereafter and at the same meeting of said Board of Directors of Imperial Irrigation District as last above found and at the same place, on the 19th. day of December, 1932, the said Board of Directors of Imperial Irrigation District, at least three members thereof being present and voting therefor did by resolution order and call a special

election to be held throughout Imperial Irrigation District on Thursday the 12th. day of January, 1933, between the hours of six o'clock A.M. and seven o'clock, P.M., of said day, in the manner provided by law, for the purpose of submitting to the qualified electors of said Imperial Irrigation District the question whether or not said Imperial Irrigation District should be authorized to enter into and execute said proposed contract and did by said resolution provide for notice of said special election as required by law and specified the form and contents of such notice and did appoint for each election precinct in said District from the electors thereof one inspector, one judge, and one clerk to constitute the Board of Election for such precinct and at such special election and did in the order appointing the Board of Election designate the house or place within the precinct where said special election would be held and did order, designate and provide all matters and things necessary to the holding and conducting of said special election as required by law.

#### FINDING NO. 16.

That notice of said special election, ordered and called as above found, to be held throughout Imperial Irrigation District on the 12th. day of January, 1933, in form and substance as specified in said resolution last above found and as required by law and as attached to and made a part of the plaintiffs' complaint herein, marked Exhibit "B" and by reference thereto made a part of said complaint, was given for the time and in the manner provided by law and the said resolution and order of said Board of Directors ordering and calling said special election, by the Secretary of the Board of Directors of Imperial Irrigation District, by posting said notice in three public places in each election precinct in said Imperial Irrigation District, and also in the office of said Board of Directors of said District for at least twenty days prior to the date of said special election, and that said Notice of said special election, among other things, specified the polling places of each precinct

and that said notice of said special election as hereinabove found and as attached to and by reference thereto made a part of the plaintiffs' complaint and marked Exhibit "C" was given as required by law and the resolution of the Board of Directors of Imperial Irrigation District ordering and calling said special election as hereinabove found, by publication of said notice in Imperial Valley Press, a newspaper of general circulation printed and published at El Centro, in said County of Imperial, State of California, where the office of the Board of Directors of Imperial Irrigation District is kept and that such publication was made once a week for at least three successive weeks prior to the date of said special election, to wit, said notice was so published on December 20, 1932, December 27, 1932, January 3, 1933, and January 10, 1933; that such notice so posted and published as hereinabove found specified among other things the time and place of holding the said special election and contained a statement of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply, and acquisition of property, exclusive of penalties and interest, together with a general statement of the property to be conveyed by said Imperial Irrigation District.

#### FINDING NO. 17.

That on the 12th. day of January, 1933, between the hours of six o'clock, A. M., and 7 o'clock, P.M. of said day, said special election was duly and regularly held throughout Imperial Irrigation District in the manner provided by law and by the said resolution and order of the Board of Directors of said Imperial Irrigation District of December, 19, 1932, ordering and calling the same as hereinabove found and pursuant to notice thereof given as also hereinabove found; that said special election was fairly conducted and the returns thereof duly and regularly transmitted by the respective officers of election of the respective election precincts and delivered to the Secretary of the Board of Directors of Imperial Irrigation District.

**FINDING NO. 18.**

That the ballot used at said special election was of material and in the form provided by law and the said resolution of the Board of Directors of Imperial Irrigation District of December 19, 1932, ordering and calling said special election as hereinabove found and that said ballot contained in the proposition to be voted upon a brief statement of the general purpose of said proposed contract and the amount of the obligation to be assumed, to wit, a statement of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply and acquisition of property, exclusive of penalties and interest, together with a general statement of the property to be conveyed by said Imperial Irrigation District, all as provided by law and the resolution of the Board of Directors of Imperial Irrigation District ordering and calling such special election and as contained in the notice thereof so posted and published both as hereinabove found. That the statement on said ballot of the proposition to be voted upon at said special election was and is in words and figures as set out in the plaintiffs' complaint in paragraph XVII thereof.

**FINDING NO. 19.**

That Monday, the 16th day of January, 1933, was the first Monday after said special election; that on said date, to wit, Monday the 16th day of January, 1933, the returns of said special election from each and every precinct in the said Imperial Irrigation District had been duly and regularly received and thereupon the Board of Directors of said Imperial Irrigation District met in regular adjourned session and as provided by law at its usual and regular place of meeting in the city of El Centro, California, at least three members thereof being present, for the purpose of canvassing the returns of said special election; that the returns from each and every precinct in the said Imperial Irrigation District was then and there before said Board

and said Board did at said time and place canvass the returns of said special election in public by opening the returns and estimating the vote of the said District for and against the proposal to enter into and execute the said proposed contract and declaring the result thereof and by resolution, at least three members of said Board voting therefor, found and declared that at said special election there were 5676 votes cast upon said proposal of which 4947 were "Contract-Yes" and 729 votes were "Contract-No", and that 4947 votes were cast in favor of authorizing Imperial Irrigation District to enter into and execute said proposed contract and 729 votes were cast against authorizing said Imperial Irrigation District to enter into and execute said proposed contract; that more than two-thirds of all the votes cast for and against said proposal to enter into and execute said proposed contract were cast in favor of authorizing Imperial Irrigation District to enter into and execute said proposed contract; that thereupon and at the same time and as a part of the said resolution of the Board of Directors of Imperial Irrigation District last above found said Board of Directors did find and declare that Imperial Irrigation District had at said special election been authorized to enter into and execute said proposed contract, and that the Secretary of the Board of Directors of Imperial Irrigation District did as soon as the said result was declared, enter in the records of the said Board of Directors a statement of such results, which statement showed and shows the total number of votes cast upon said proposal in the said District and in each division thereof, the proposal voted upon, and the total number of votes cast in each division in favor of said proposal and the total number of votes cast in each division against such proposal and the total number of votes cast in the said District in favor of said proposal and the total number of votes cast in said District against said proposal.

**FINDING NO. 20.**

That at said special election there were 5676 votes cast upon said proposal to enter into said proposed contract, of which 4947 votes were in favor of Imperial Irrigation District entering into and executing said proposed contract and 729 votes were against Imperial Irrigation District entering into and executing said proposed contract; that more than two-thirds of all of the votes cast for and against said proposal to enter into and execute said proposed contract were cast in favor of authorizing Imperial Irrigation District to enter into and execute said proposed contract and that by said vote Imperial Irrigation District had been and was authorized to enter into and execute said proposed contract.

**FINDING NO. 21.**

That thereafter and on the same day and at the same place and at the same meeting of said Board of Directors of said Imperial Irrigation District, on towit, the 16th. day of January, 1933, the Board of Directors of Imperial Irrigation District did by resolution at least three members of said Board voting therefor, authorize and direct John L. DuBois, the President of the Board of Directors of Imperial Irrigation District, to sign and execute said proposed contract in duplicate original for and on behalf of Imperial Irrigation District, and F. H. McIver, Secretary of said Board of Directors to attest the execution thereof and to affix thereto the seal of Imperial Irrigation District and make proper delivery of said contract to the Secretary of the Interior for the United States of America.

**FINDING NO. 22.**

That thereafter and on the same day, towit, the 16th. day of January, 1933, the said John L. DuBois, as President of the Board of Directors of Imperial Irrigation District did sign and execute said proposed contract in duplicate original for and on behalf of Imperial Irrigation

District and F. H. McIver, as Secretary of the Board of Directors of Imperial Irrigation District and thereupon attested the execution thereof and affixed thereto the seal of Imperial Irrigation District and made due and proper delivery of said contract to the Secretary of the Interior for the United States of America, and that at said time and place Imperial Irrigation District executed said proposed contract theretofore signed and executed by the United States of America for this purpose by Ray Lyman Wilbur, Secretary of the Interior, and dated the 1st. day of December, 1932, and being the same contract, a true and correct copy of which is attached to the plaintiffs' complaint marked Exhibit "A" and by reference thereto made a part of said complaint.

#### FINDING NO. 23.

That the defendant Coachella Valley County Water District is now and ever since on or about the 16th. day of January, 1918, has been a duly organized and existing county water district in the county of Riverside, State of California, under and by virtue of the laws of California, and particularly by an act of the Legislature of said State entitled: "An act to Provide for the Incorporation and Organization and Management of County Water Districts and to Provide for the Acquisition of Water Rights or Construction thereby of Water Works and for the acquisition of all property necessary therefor and also to provide for the distribution and sale of Water by said Districts" approved June 10, 1913, as amended, and that said Coachella Valley County Water District hereinafter in these Findings referred to as "Coachella District" is situate wholly within the County of Riverside and embraces within its boundaries approximately 997,000 acres of land including therein substantially all lands in said County of Riverside within that certain valley in said county commonly known and designated as the "Coachella Valley" and also certain mountainous lands on the east, west and north of said valley, which mountainous lands form a large part of

the water shed of said valley and that said Coachella Valley extends southeasterly for a distance of about 60 miles from the summit of San Gorgonio Pass at an elevation of about 2500 feet above sea level to the southerly boundary line of Riverside County at or near the Salton Sea at an elevation of approximately 250 feet below sea level.

#### FINDING NO. 24.

That approximately 150,000 acres of land in said Coachella Valley and within said Coachella District lie within the "area to be included" in Imperial Irrigation District as set out and defined in the contract between Imperial Irrigation District and the United States, dated the 1st day of December, 1932, hereinabove in these Findings referred to.

#### FINDING NO. 25.

That the climate in said Coachella Valley is arid and hot and the average annual rainfall is less than three inches; that because of said aridity, heat and limited rainfall, crops of commercial value cannot profitably be produced in said valley without regular and frequent irrigation with large quantities of water; that without sufficient water for irrigation of said lands, said lands would be of little or no value; that quantities of water annually fall in the form of rain or snow during the rainy season of each year upon the mountainous lands constituting the water shed of said valley and said water flows through natural streams into said valley and substantially all of said water sinks and percolates into underground strata of gravel and other porous substances beneath said valley. That much of said water can be recovered therefrom by means of wells.

#### FINDING NO. 26.

That since about the year 1902, certain lands in Coachella Valley and within said "area to be included within Imperial Irrigation District as said area is defined in said contract dated the 1st. day of December, 1932, between

the United States of America and Imperial Irrigation District above mentioned, hereinafter in these findings referred to as "area to be included", have been developed, farmed, and irrigated with water produced by wells from said underground strata; that the area of lands in said "area to be included" thus developed and irrigated has gradually increased to about 15,000 acres; that the irrigation of said lands now cultivated consumes annually more than the quantity of water annually flowing into the said valley from said streams and that it is necessary in order that said 15,000 acres of developed and irrigated lands may be maintained and that additional lands in said valley be cultivated that an additional and supplementary supply of water be obtained and furnished for the irrigation of said lands in the said "area to be included"; that no other adequate, practicable or feasible source of water supply for said valley is known to exist than the Colorado River; that adequate water for the irrigation of said lands in said Coachella Valley within said "area to be included" can be practicably and feasibly procured from the Colorado River by means of the canal provided for in the said contract between the United States of America and Imperial Irrigation District, dated the 1st day of December, 1932, hereinafter in these findings referred to as the "All American Canal".

#### FINDING NO. 27.

That the lands in said Coachella District outside said "area to be included" will be benefited by the construction of the All American Canal and the use of water therefrom for irrigation within the said "area to be included".

#### FINDING NO. 28.

(1) That in the year 1918, a movement for the construction of an All American Canal was initiated by communities and interests desirous of obtaining water from the Colorado River for the purpose of irrigation and domestic use in the Imperial and Coachella Valleys and other

areas; that said movement has since that time been commonly known and designated as the "All American Canal Project". That said Coachella Valley County Water District was organized for the primary purpose of furthering measures and legislation to effectuate the All American Canal Project and for the purpose of serving as the official representative of said Coachella Valley in relation to the furtherance of said Project and the administration of the interests of said valley in said Project. That from the time of its organization said Coachella District has consistently and continuously devoted its efforts to the furtherance of said Project for the benefit of said Coachella Valley.

(2) That on the 16th day of February, 1918, there was executed by and between the United States and the Imperial Irrigation District, hereinafter sometimes called "Imperial District", as agreement for the investigation, survey and cost-estimate of an All American Canal by a Board thereafter known as the All American Canal Board; that said Board thereafter reported, recommending the construction of such canal for the service of irrigation and domestic water to the Imperial Valley and reported that it was its belief that it would be necessary to construct in the future a high line canal to serve lands in the Imperial and Coachella Valleys.

That under date of October 23, 1918, there was executed by the United States and the Imperial District an agreement for the connection of the main canal of said Imperial District with that certain dam on the Colorado River commonly known and designated as the "Laguna Dam"; that said agreement provided for the construction of a main canal entirely within the United States from said Laguna Dam to the canal system of said Imperial District in the Imperial Valley; that in said agreement the United States reserved the right to arrange for the connection with and use of Laguna Dam on such terms as the Secretary of the Interior might deem expedient, by any other irrigation enterprise, district, corporation or individual; also of the

head works and main canal and other governmentally constructed works and works constructed jointly by the parties to said agreement, after proper enlargement and modification on terms stipulated therein, without, however, impairing the utilization of said dam, canal, and other works to the extent necessary to irrigate the lands within the boundaries of the Imperial Irrigation District.

That on the 17th day of June, 1919, there was introduced in the House of Representatives of the Congress of the United States a bill, known as the "First Kettner Bill", and numbered H. R. 6044, 66th Congress, 1st Session, providing for the construction of a canal and necessary works entirely within the United States, connecting the present irrigation system of said Imperial District with Laguna Dam and providing for use thereof by any other district or districts, including County Water Districts, which should issue and deposit with the Secretary of the Interior their bonds as a contribution to the cost of said works. Said bill provided that all moneys derived from the sale of unentered public lands of the United States in Imperial Valley and Coachella Valley, California, be used to guarantee payment of said bonds; that said bill was not enacted into law.

That on the 7th day of January, 1920, a bill was introduced in said House of Representatives, known as the "Second Kettner Bill", and numbered H.R. 11553, 66th Congress, 2d Session, authorizing the Secretary of the Interior to construct the above mentioned canal and works and to enter into contracts with the Imperial Irrigation District, the Coachella Valley County Water District and other districts and associations, for repayment of the cost of said works; that said bill was not enacted into law.

That on the 18th day of May, 1920, there was enacted by said Congress an act (41 Stat. 600) commonly known as the "Kincaid Act", whereby the sum of \$20,000.00 was appropriated for investigation and report upon an irriga-

tion system to serve the lands in the Imperial Valley and adjacent thereto by diversion of water from the Colorado River at Laguna Dam, and thereafter such an investigation was made at the joint expense of the United States, said Imperial District and said Coachella District. That said Coachella District contributed and paid to the United States as its share of the cost of said investigation and report thereon the sum of \$6,000.00.

That on the 11th day of November, 1920, Arthur P. Davis, Director of the United States Bureau of Reclamation, addressed to said Coachella District and other districts, agencies and interests, a letter inquiring whether such districts, agencies and interests desired to participate in irrigation from the Colorado River. That by letter to said director, dated November 23, 1920, said Coachella District definitely informed said director that it desired to participate in said Project. That on February 28, 1922, Albert B. Fall, Secretary of the Interior, transmitted to said Congress his report under said Kincaid Act, by which said Secretary recommended the construction of said All American Canal for the benefit of said Imperial and Coachella Valleys, and also recommended the construction of a dam and reservoir at or near Boulder Canyon on said Colorado River.

That in pursuance of said recommendations there was introduced in said House of Representatives on April 25, 1922, a bill known as the "First Swing-Johnson Bill", and numbered H.R. 11449, 67th Congress, 2d Session, for the construction of said dam at or near Boulder Canyon and a main canal and appurtenant structures for the diversion of water from said Colorado River at the Laguna Dam and delivery of water for irrigation and domestic use to the Imperial and Coachella Valleys; that said bill was not enacted into law.

That there was introduced in said House of Representatives on December 10, 1923, a bill for the like purposes,

known as the "Second Swing-Johnson Bill", and numbered H.R. 2903, 68th Congress, 1st Session; said bill was not enacted into law.

That there was introduced in the said House of Representatives on December 21, 1925, a bill for like purposes, known as the "Third Swing-Johnson Bill", and numbered H.R. 6251, 69th Congress, 1st Session; that said bill was not enacted into law.

That there was introduced in said House of Representatives on December 5, 1927, a bill for like purposes, known as the "Fourth Swing-Johnson Bill", and numbered H.R. 5773, 70th Congress, 2d Session, and that said bill was thereafter, on the 21st day of December, 1928, enacted into law (45 Stat. 1057) and is now known and designated as the "Boulder Canyon Project Act".

That on the 26th day of March, 1929, said Coachella District, said Imperial District and the United States entered into an agreement for the contribution by each of said entities to a fund for the purpose of making investigations, surveys and cost-estimates of the All American Canal from the Colorado River to the Imperial and Coachella Valleys, as authorized by the Boulder Canyon Project Act; that under and pursuant to said agreement, said Coachella District contributed and paid to the United States as its share of the cost of said investigation the sum of \$10,000.00. That investigations were made pursuant to said agreement and a report was prepared by H. J. Gault, as hereinbefore found.

(3) That the allegations contained in Paragraph VIII of the First Defense contained in the Answer of the defendants, Coachella Valley County Water District et al., are true.

(4) That at all times since the year 1919 it has been contemplated that the lands in said Coachella District in said "area to be included" were a part of the area to be

benefited and served with water under said Project, and that said lands in said Coachella District have been, in each of said legislative measures in said Congress, specified and mentioned as beneficiaries of said measures; that each and all of the acts and proceedings of said Coachella District in relation to said Project have been had and taken in pursuance of said facts and in reliance upon the participation in said Project of said lands in said Coachella District, as a part of the area to be served by said All American Canal. That in the furtherance of said All American Canal Project, said Coachella District has expended, from the funds derived by it from taxation upon property in said Coachella District, amounts of money exceeding in the aggregate the sum of \$150,000.00.

#### FINDING NO. 29.

That the greater part of the lands within said Coachella District is unproductive desert land, but is held in private ownership; that with water provided for irrigation by said All American Canal said unproductive lands in said "area to be included" can be intensively developed for specialty crops such as dates, grapefruit and early grapes, and will produce profitable crops of great value, and said lands will, by reason of the supply of water from the Colorado River, become of very great value, whereas said lands without such water have little value; that, acting in reliance upon and in contemplation of receiving water from the Colorado River to serve said lands in said Coachella District, the landowners owning said unproductive lands have for more than fifteen years last past continued to pay taxes to said Coachella District and to the County of Riverside; that had said land owners not anticipated and relied upon receiving water from Colorado River, they would have failed and refused to pay such taxes, and the greater portion of said Coachella District would long since have been deeded to the State of California for delinquent taxes, as provided by law.

FINDING NO. 30.

That each of the defendants, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre is the owner of lands in said Coachella District and within the "area to be included."

FINDING NO. 31.

That the defendant Charles Malan is the owner of more than 160 acres of land within Imperial Irrigation District and is an assessment payer and taxpayer therein.

FINDING NO. 32.

That the maximum amount of money to be payable by said Imperial Irrigation District to the United States under said contract between the United States and said District, dated the 1st. day of December, 1932, for construction purposes, cost of water supply and acquisition of property exclusive of penalties and interest was and is accurately and correctly stated in both the notice of said special election posted and published as hereinabove found and on the ballot used at said special election, also as hereinabove found; that the maximum amount of money to be payable by Imperial Irrigation District to the United States under and by the terms of said contract for construction purposes, cost of water supply and acquisition of property exclusive of penalties and interest will not exceed \$38,500,000 together with \$768,000 still unpaid at the date of said special election under Article 9 of a certain contract between the United States and Imperial Irrigation District of October 23, 1918; that no damage will result to the lands or property of sundry and numerous or any persons above said proposed dam or at all if and when works described and provided for in said contract are actually constructed and used as provided in said contract, and that said works will not cause any land belonging to other persons to be flooded and waterlogged and damaged or flooded or waterlogged or damaged and that no damage will extend over

or upon any part of the lands embraced in the Palo Verde Irrigation District and no damage will thus be caused by the United States or by Imperial Irrigation District or otherwise to any property due to the existence, operation or maintenance of the diversion dam and main canal described or referred to in the said contract, or for any other reason.

**FINDING NO. 33.**

That no statement, matter or thing was inserted in said notice or in said ballot or omitted from said notice or from said ballot for the purpose of deceiving the voters of said Imperial Irrigation District and/or causing said voters or any of them erroneously to believe that the total amount of obligation assumed to the United States by said contract for construction purposes, cost of water supply, and acquisition of property exclusive of penalties and interest was the sum of \$38,500,000 and that no person or voter in Imperial Irrigation District was misled or deceived by any statement in said notice of special election or in the ballot used thereat but that all persons and all voters within Imperial Irrigation District were fully, completely and accurately informed by said notice and in said ballot of the maximum amount of money to be payable to the United States for construction purposes, cost of water supply and acquisition of property exclusive of penalties and interest and were also fully and accurately informed by said notice and in said ballot of the property to be conveyed by the District to the United States, and of all obligations to be assumed by said District.

**FINDING NO. 34.**

That the making of the said canal provided for by said Contract between the United States of America and Imperial Irrigation District, dated the 1st day of December, 1932, of the capacity of 10,000 cubic feet of water per second from Pilot Knob to Engineer Station 1907 is not a

capacity more than double the amount of any water which can possibly be used by the said Imperial Irrigation District, or any amount in excess of anticipated reasonable requirements of said District and that said canal and said capacity or either is not intended solely and entirely or either or intended at all for the purpose of conveying water to lands outside of said Imperial Irrigation District, and which may never be a part of the said Imperial Irrigation District.

**FINDING NO. 35.**

That under said Contract between the United States and Imperial Irrigation District, dated the 1st day of December, 1932, the delivery of water will not be limited to 160 acres in a single ownership and that the lands of the defendant Charles Malan in excess of 160 acres will not be denied water because of the size of said ownership, and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract, so far as the size of individual ownership is concerned.

**FINDING NO. 36.**

The obligation to provide capacity in the canal contemplated by said contract between the United States and Imperial Irrigation District, dated the 1st day of December, 1932, for the benefit of the Yuma Project of the United States Bureau of Reclamation provided for by said contract is fully and adequately supported by a good, valuable and adequate consideration.

**FINDING NO. 37.**

That certain power possibilities, consisting of drops at which power may be generated, upon the construction of said canal, will exist at Pilot Knob and elsewhere upon said canal; that it is not true that in the event the capacities of the canal provided for in said contract between the United States and Imperial Irrigation District dated the 1st day of December, 1932, are reduced by reason of the

failure of the lands in Coachella Valley and within the said area to be included to petition for inclusion or to be included within Imperial Irrigation District within the time limit provided in said contract for such inclusion the owners of land situate within the Coachella Valley and within the "area to be included" will be deprived of water or the possibility of obtaining water from the Colorado River by any practicable or feasible means for the irrigation of said lands or for domestic use thereon.

#### FINDING NO. 38.

That said contract between the United States and Imperial Irrigation District, dated the first day of December, 1932, is not illegal and is not invalid and is not unauthorized and is not void for the reasons or for any of the reasons stated, mentioned or alleged in any of the defenses contained in either or any of the answers of any of the defendants herein or illegal or invalid or unauthorized or void for any reason or at all.

#### CONCLUSIONS OF LAW

##### I

That each and every act necessary to be done or performed both by the United States and by Imperial Irrigation District and their respective officers necessary to be done or performed in order to make said contract between the United States of America and Imperial Irrigation District dated the 1st day of December, 1932, a legal and binding contract between the United States of America and Imperial Irrigation District has been fully and completely done and performed and that all acts or proceedings by other agencies or officers necessary to be done or performed to that end have likewise been duly, regularly and fully done, and performed, and that each and all of said acts were done and performed within the time and in the manner provided by law and that said Contract was

duly and properly executed prior to the commencement of this action as hereinabove found and that since said execution said contract has been and now is the legal and binding contract in all respects of the United States of America and Imperial Irrigation District.

## II

That said contract between the United States and Imperial Irrigation District, dated the first day of December, 1932, is not illegal and is not invalid and is not unauthorized and is not void for the reasons or for any of the reasons stated, mentioned or alleged in any of the defenses contained in either or any of the answers of any of the defendants herein or illegal or invalid or unauthorized or void for any reason or at all.

## III

That this action and these proceedings were commenced and prosecuted pursuant to and in the manner provided by law and that summons herein in form and substance as provided by law was duly and regularly issued and served upon all defendants in the manner provided by law and the order of this Court duly and properly and lawfully given and made and that after full and complete service of said summons upon all defendants had been made as provided by law and in accordance with said order of this Court and the time provided by law for appearance having expired the default of the defendants, namely: all persons, including all those in anyway interested or to be interested in that certain Contract, dated December 1, 1932, entitled "Contract for Construction of Diversion Dam, Main Canal, and Appurtenant Structures, and for Delivery of Water", between the United States of America and Imperial Irrigation District, the execution of which was authorized at an election held in said District on the 12th day of January, 1933, and all those having or claiming any right, title or interest in or lien or claim upon the property within said District or any part thereof, and all real property within

said District, was duly and regularly entered upon order of this Court, regularly and properly and lawfully made and given, except as to the defendants Coachella Valley County Water District, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones, Washington Irving [sic], and Charles Malan who had appeared and answered herein.

#### IV

That this action is authorized by law as an action in rem and that the Court has jurisdiction of the subject matter and of all parties herein.

#### V

That said contract involved in these proceedings and dated the 1st. day of December, 1932, and entitled, "Contract for Construction of Diversion Dam, Main Canal and Appurtenant Structures and for Delivery of Water" between the United States of America and Imperial Irrigation District for the construction of a diversion dam in the main stream of the Colorado River and a main canal and appurtenant structures located entirely within the United States connecting said diversion dam with the Imperial and Coachella Valleys in California, and for the repayment of the cost thereof as provided in the reclamation law, a true and correct copy of said contract being attached to the complaint in this action marked Exhibit "A" and by reference thereto made a part of said complaint is the valid and legal contract in all respects of the parties thereto.

#### VI

That each and every term, condition, article, section and clause of said contract is legal and valid and that said contract is legal and valid and within the lawful powers of the United States of America and of Imperial Irrigation District to enter into, make and execute.

## VII

That Ray Lyman Wilbur, Secretary of the Interior of the United States of America, was duly and lawfully authorized to execute said contract on behalf of the United States of America, and that the said Ray Lyman Wilbur did execute said contract on behalf of the United States of America and the United States of America did thereby execute said contract and was and is in all respects fully bound thereby.

## VIII

That on the 12th. day of January, 1933, a special election was held throughout Imperial Irrigation District, at which was submitted to the qualified electors of said District the proposition of whether or not Imperial Irrigation District should be authorized to enter into and execute said contract and that said special election was called, held and conducted in all respects as provided by law and that each and every act or proceeding necessary in or to the calling and holding of said special election was done and performed by the proper officers lawfully authorized to do and perform such acts and proceedings and that said special election was in all respects regular, valid and legal. That said special election was fairly and regularly conducted and the result thereof was properly and regularly declared within the time and manner provided by law and properly and lawfully entered in the proper and lawful records of Imperial Irrigation District.

## IX

That the duly qualified electors of Imperial Irrigation District by their vote at said special election properly and lawfully authorized Imperial Irrigation District to enter into and execute said contract.

## X

That the Board of Directors of Imperial Irrigation District and the Secretary of said Board of Directors did and

performed every act and proceeding necessary to the lawful execution of said contract and were fully and legally authorized to execute and did execute said contract as provided by law for and on behalf of Imperial Irrigation District and that thereby Imperial Irrigation District executed said contract and that said contract thereupon became and is the lawful contract of Imperial Irrigation District and that Imperial Irrigation District is fully and in all respects bound thereby.

XI

That neither the United States nor Imperial Irrigation District is limited by the terms of said contract or by any law applicable thereto in the delivery of water to any maximum acreage of land held in a single ownership.

XII.

That the plaintiffs are entitled to judgment against all defendants as prayed for in the plaintiffs' complaint.

Dated, July 1, 1933.

/s/ EMMETT H. WILSON  
JUDGE OF THE SUPERIOR COURT.

ENDORSED  
FILED JUL. 3, 1933  
EDWARD H. LAW, COUNTY CLERK  
BY G. O. KENYON, DEPUTY

THE FOREGOING INSTRUMENT IS A CORRECT COPY OF  
THE  
ORIGINAL ON FILE IN THIS OFFICE  
ATTEST: May 3, 1956  
HARRY M. FREE

COUNTY CLERK AND CLERK OF THE SUPERIOR COURT IN  
AND FOR THE COUNTY OF IMPERIAL, STATE OF  
CALIFORNIA  
By /s/ LUCILE MORRISON, DEPUTY

IN THE SUPERIOR COURT OF THE )  
STATE OF CALIFORNIA, )  
IN AND FOR THE COUNTY OF IMPERIAL. )

IN THE MATTER OF THE VALIDATION OF )  
A CONTRACT, DATED DECEMBER 1, 1932, )  
ENTITLED "CONTRACT FOR CONSTRUC- )  
TION OF DIVERSION DAM, MAIN CANAL )  
AND APPURTENANT STRUCTURES, AND )  
FOR DELIVERY OF WATER" BETWEEN )  
THE UNITED STATES OF AMERICA AND )  
IMPERIAL IRRIGATION DISTRICT, THE )  
EXECUTION OF WHICH WAS AUTHORIZED )  
AT AN ELECTION HELD IN SAID DIS- )  
TRICT ON THE 12TH DAY OF JANUARY, )  
1933. )

No. 15460 )

EVAN T. HEWES, IRA ATEN, WILLIAM E. YOUNG, )  
BURLEIGH ADAMS, AND MARK ROSE, AS AND CON- )  
STITUTING THE BOARD OF DIRECTORS OF IMPE- )  
RIAL IRRIGATION DISTRICT AND IMPERIAL )  
IRRIGATION DISTRICT, )  
Plaintiffs, )

vs. )

ALL PERSONS, INCLUDING ALL THOSE IN ANYWAY )  
INTERESTED OR TO BE INTERESTED IN THAT CER- )  
TAIN CONTRACT, DATED DECEMBER 1, 1932, EN- )  
TITLED, "CONTRACT FOR CONSTRUCTION OF )  
DIVERSION DAM, MAIN CANAL AND APPURTE- )  
NANT STRUCTURES, AND FOR DELIVERY OF )  
WATER", BETWEEN THE UNITED STATES OF )  
AMERICA AND IMPERIAL IRRIGATION DISTRICT, )  
THE EXECUTION OF WHICH WAS AUTHORIZED AT )  
AN ELECTION HELD IN SAID DISTRICT ON THE )  
12TH DAY OF JANUARY, 1933, AND ALL THOSE )  
HAVING OR CLAIMING ANY RIGHT, TITLE OR IN- )  
TEREST IN OR LIEN OR CLAIM UPON THE PROP- )  
ERTY WITHIN SAID DISTRICT OR ANY PART )  
THEREOF, AND ALL REAL PROPERTY WITHIN )  
SAID DISTRICT. )  
Defendants )

## JUDGMENT.

The above entitled cause came on regularly for trial, and was tried at the Court Room of the above entitled Court in the city of El Centro, County of Imperial, State of California, commencing on the 16th day of March, 1933, before the Court sitting without a jury, a jury trial having been waived, Hon. Emmet H. Wilson, Judge presiding, upon the complaint, the demurrer and answer of the defendants, Coachella Valley County Water District, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre, and upon the answer of the defendant Charles Malan, Chas. L. Childers and D. B. Roberts of El Centro, California, appearing as counsel for the Plaintiffs and W. G. Irving of Riverside, California, and Stewart, Shaw & Murphy of Los Angeles, California, appearing as counsel for Coachella Valley County Water District, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre, and M. W. Conkling, of San Diego, California, appearing as counsel for Charles Malan. Upon suggestion to the Court that the term of office of the plaintiff John L. DuBois had, subsequent to the commencement of said action, and prior to the trial thereof, expired and Evan T. Hewes had been elected as Director of Imperial Irrigation District to succeed the said John L. DuBois and had duly qualified as such director, and that the term of office of the plaintiff W. O. Blair had expired subsequent to the commencement of said action and prior to the trial thereof, and that William E. Young had been elected as Director of Imperial Irrigation District to succeed the said W. O. Blair and had duly qualified as such director, upon motion of counsel for the plaintiffs, and good cause appearing therefor and there being no objection thereto it was ordered that Evan T. Hewes be substituted as party plaintiff for and instead of the plaintiff John L. DuBois and that William E. Young be substituted as party plaintiff for and instead of the plaintiff W. O. Blair and it appearing to the satisfaction of the Court that this is an

action in rem authorized by law and that summons herein was duly and properly issued as provided by law and was served upon all defendants in the manner provided by law and the order of this Court duly and properly made and that the time within which the defendants or any of them are by law authorized to appear in said cause and answer or otherwise plead therein had fully expired, the default of all of said defendants, except those defendants hereinabove named who had appeared therein was duly and regularly entered and it further appearing that the Board of Directors of Imperial Irrigation District, within the proper time, brought this action in the above named Court in the County of Imperial, State of California, where the office of the said Board of Directors is and was at all times since prior to July 1, 1932, located and that the Court had and has jurisdiction of the subject matter and of the parties and all of them and Findings of Fact and Conclusions of Law constituting the Court's decision in this cause having been duly made and filed,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that that certain contract entitled, "Contract for the Construction of Diversion Dam, Main Canal and Appurtenant Structures and for Delivery of Water" between the United States of America and Imperial Irrigation District for the construction of a diversion dam in the main stream of the Colorado River and a main canal and appurtenant structures located entirely within the United States connecting said diversion dam with the Imperial and Coachella Valleys in California and for the repayment of the cost thereof as provided in the Reclamation Law, a true and correct copy of said contract being attached to the plaintiffs' complaint in this action marked Exhibit "A" and by reference thereto made a part of said complaint, is and each and every article, clause, section and part thereof is lawful and valid and that the Board of Directors and officers of Imperial Irrigation District and the officers of the United States of America, who purport-

ed to have executed or caused said contract to be executed, were fully, duly, and lawfully authorized to enter into and execute said contract for and on behalf of Imperial Irrigation District and of the United States of America, respectively, and that each and every act, thing and proceeding necessary to be done, had, taken or performed to that end was done, had, taken or performed at and within the time provided by law and in the form and manner provided by law and by the proper officer or officers or person or persons, and that said contract was and is in all respects properly and lawfully executed and is, in all respects, the contract of Imperial Irrigation District and the United States of America, and that Imperial Irrigation District and the United States of America are fully and lawfully authorized in all respects to comply with and fully and completely carry out the terms and provisions of said contract as provided and contained therein; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants Coachella Valley County Water District, A. B. Cliff, John H. Colbert, R. C. Egnew, J. C. Jones and Washington McIntyre, and Charles Malan, who have appeared in this action take nothing by their alleged defenses and that the plaintiff recover of and from said named defendants their costs herein, taxed at \$ . . . . .

Dated, July 1, 1933.

/s/ Emmet H. Wilson

Judge of the Superior Court.

Entered July 5, 1933 at 4:30 P M.  
Book 16, Judgments Page 323

ENDORSED  
FILED July 3 1933  
HARRY M. FREE  
COUNTY CLERK  
By C. O. KENYON  
DEPUTY

154a

THE FOREGOING INSTRUMENTS IS A CORRECT COPY OF  
THE ORIGINAL ON FILE IN THIS OFFICE

ATTEST: May 3 1956

HARRY M. FREE

County Clerk and Clerk of the Superior Court, in and for  
the County of Imperial, State of California.

BY /s/ Lucile Morrison DEPUTY

## APPENDIX I

## Relevant Provisions of the Boulder Canyon Project Act

[Sec. 1. Dam at Black or Boulder Canyon for flood control, improving navigation, and for storage and delivery of water—Main canal to supply water for Imperial and Coachella Valleys—Power plant—All works in conformity with Colorado River compact.]—For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip,

operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, and other property necessary for said purposes. (45 Stat. 1057; 43 U.S.C. §617)

\* \* \* \* \*

Sec. 4. (a) [When Act effective—Ratification of Colorado River compact—Proclamation by President—Agreement by California required—Agreement authorized by Arizona, California, and Nevada—Apportionment of waters—Consumptive use of Gila River by Arizona—Water for domestic and agricultural use.]—This act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and uncon-

ditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters in the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of Califor-

nia shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada. (45 Stat. 1058; 43 U.S.C. §617c(a) )

**(b) [Contracts required for revenues to insure payment of expenses of operation and maintenance, etc., and repayment of construction within 50 years, before any money is appropriated—Work on main canal contingent on provision to insure payment of expenses—Payments to Arizona and Nevada.]**—Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise,

adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18 $\frac{3}{4}$  per centum of such excess revenues and to the State of Nevada 18 $\frac{3}{4}$  per centum of such excess revenues. (45 Stat. 1059; 43 U.S.C. §617c(b)).

**Sec. 5. [Contracts for storage of water and its delivery, and for generation and sale of electrical energy—Congress to prescribe basis of charges—Revenues to be in separate fund. (a) Time limit of 50 years on contracts for electrical energy—Contracts to be made with view of returns—Readjustment of contracts upon demand. (b) Renewal of electrical energy contracts. (c) Contracts to be made with responsible applicants for meeting revenues required—Adjustment of conflicting applications. (d) Contracting agencies for electrical energy may be required to share in benefits.]**—The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works con-

structed under this act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof

upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal water power act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however,* That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the

applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy. (45 Stat. 1060; 43 U.S.C. §617d)

Sec. 6. [River regulation, improvement of navigation, flood control—Irrigation and domestic use—Power—Title of dam to remain in United States—Contracts of lease of a unit or units of Government-built plant with right to generate electrical energy—Rules and regulations regarding maintenance of works to be in conformity with Federal water power act—Issuance of power permits or licenses.]—The dam and reservoir provided for by section 1 hereof

shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal water power act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this act or penalizing failure to comply with such regulations or with the provisions of this act. He shall also conform with other provisions of the Federal water power act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal water power act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this act shall become effective as provided in section 4 herein. (45 Stat. 1061; 43 U.S.C. §617e)

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**Sec. 8. [ (a) Colorado River compact to control in use of water. (b) Use of water also governed by compact among States of the lower division.]**—(a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of

water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided*, That in the latter case, such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress. (45 Stat. 1062; 43 U.S.C. §617g)

Sec. 9. [Withdrawal of all irrigable lands—Entry under reclamation law—Preference in entry to soldiers.]—All lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: *Provided*, That all persons who served in the United States Army, Navy, Marine Corps, or Coast Guard during World War II, the War with Germany, the War with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c)

of section 4 of the Act of December 5, 1924 (43 Stat. 672, 702; 43 U.S.C., sec. 433); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this act: *Provided further*, That the above exclusive preference rights shall apply to veteran settlers on lands watered from the Gila canal in Arizona the same as to veteran settlers on lands watered from the All-American canal in California: *Provided further*, That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preference in this section provided. (45 Stat. 1063; Act of March 6, 1946, 60 Stat. 36; 43 U.S.C. §617h.)

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**Sec. 12. [Definitions of terminology employed.]—...**

“Reclamation law” as used in this act shall be understood to mean that certain act of the Congress of the United States approved June 17, 1902, entitled “An Act appropriating the receipts from the sale and disposal of public land in certain certain States and Territories to the construction of irrigation works for the reclamation of arid lands”, and the acts amendatory thereof and supplemental thereto.

... (45 Stat. 1064; 43 U.S.C. §617k).

\* \* \* \* \*

**Sec. 14. [This act a supplement to the reclamation law.]—**  
This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided. (45 Stat. 1065; 43 U.S.C. §617m)

\* \* \* \* \*

**Sec. 18. [Rights of States to waters within their borders.]**—Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement. (45 Stat. 1065; 43 U.S.C. §617q)

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**APPENDIX J**  
**COLORADO RIVER COMPACT**

\* \* \* \* \*

**ARTICLE VIII**

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situated.

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## APPENDIX K

**Section 1 of the 1922 Act to Provide for the Application of the Reclamation Law to Irrigation Districts**

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[Sec. 1. Application of reclamation law to irrigation districts—Individual water-right applications dispensed with.]—In carrying out the purposes of the act of June 17, 1902 (Thirty-second Statutes, page 388), and acts amendatory thereof and supplementary thereto, and known as and called the reclamation law, the Secretary of the Interior may enter into contract with any legally organized irrigation district whereby such irrigation district shall agree to pay the moneys required to be paid to the United States, and in such event water-right applications on the part of landowners and entrymen, in the discretion of the Secretary of the Interior, may be dispensed with. In the event of such contract being made with an irrigation district, the Secretary of the Interior, in his discretion, may contract that the payments, both for the construction of irrigation works and for operation and maintenance, on the part of the district shall be made upon such dates as will best conform to the district and taxation laws of the respective States under which such irrigation district shall be formed; and if he deem it advisable, he may contract for such penalties or interest charges in case of delinquency in payment as he may deem proper and consistent with such State laws, notwithstanding the provisions of sections 1, 2, 3, 5, and 6 of the reclamation extension act approved August 13, 1914 (Thirty-eighth Statutes, page 686). The Secretary of the Interior may accept a partial payment of the amount due from any district to the United States, providing such acceptance shall not constitute a waiver of the balance remaining due nor the interest or penalties, if any, accruing upon said balance: *Provided*, That no contract with an irrigation district under this act shall be binding on the United States until the proceedings

on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid. (42 Stat. 541; 43 U.S.C. §511)

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**APPENDIX L****Section 301 (b) of the Colorado River Basin Storage  
Project Act**

[Sec. 301] (b) Article II (b) (3) of the decree of the Supreme Court of the United States in Arizona against California (376 U.S. 340) shall be so administered that in any year in which, as determined by the Secretary, there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada, diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada. Water users in the State of Nevada shall not be required to bear shortages in any proportion greater than would have been imposed in the absence of this subsection 301(b). This subsection shall not affect the relative priorities, among themselves, of water users in Arizona, Nevada, and California which are senior to diversions for the Central Arizona Project, or amend any provisions of said decree. (82 Stat. 887; 43 U.S.C. §1521)

## APPENDIX M

## Relevant Provisions of the 1902 Reclamation Act

Sec. 3. [Withdrawal of lands for irrigation works—Withdrawal of lands susceptible of irrigation—Homestead entries—Determination whether project is practicable—Restoration and entry—Commutation.]—The Secretary of the Interior shall, before giving the public notice provided for in section 4 of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this act. (32 Stat. 388; 43 U.S.C. §§ 416, 432, 434)

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**Sec. 5. [Reclamation requirements for entrymen—No water for more than 160 acres of private lands in one ownership—Residence of landowner—Receipts to reclamation fund.]**—The entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section 4. No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. All moneys received from the above sources shall be paid into the reclamation fund. (32 Stat. 389; §1, Act of December 16, 1930, 46 Stat. 1029; §8, Act of September 6, 1966, 80 Stat. 639; 43 U.S.C. §§392, 431, 439)

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**Sec. 8. [Irrigation laws of States and Territories not affected—Interstate streams—Water rights.]**—Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right. (32 Stat. 390; 43 U.S.C. §§372, 383)

## APPENDIX N

**Section 46 of the Omnibus Adjustment Act of 1926, as amended**

\* \* \* \* \*

**Sec. 46. [No water delivery on new projects until contracts made by district for payment of costs—Cooperation of States—Appraisal and sale of lands in private ownership in excess of 160 acres—No water if owner refuses to sell—Payment required before right to receive water—Payments of operation and maintenance charges annually in advance—Public notice when water available.]—No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised**

in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided, however,* That if excess land is acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgages, by inheritance, or by devise, water therefor may be furnished temporarily for a period not exceeding five years from the effective date of such acquisition, delivery of water thereafter ceasing until the transfer thereof to a landowner duly qualified to secure water therefor: *Provided further,* That the operation and maintenance charges on account of lands in said projects and division shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment. (44 Stat. 649; Act of July 11, 1956, 70 Stat. 524; 43 U.S.C. §423e)

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**APPENDIX O**  
**Section 1738 of the Judicial Code**

Sec. 1738. The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (62 Stat. 947, 28 U.S.C. § 1738)

**APPENDIX P****UNITED STATES DEPARTMENT OF THE INTERIOR  
BUREAU OF RECLAMATION****BOULDER CANYON PROJECT****ALL-AMERICAN CANAL****CONTRACT FOR CONSTRUCTION OF DIVERSION DAM,  
MAIN CANAL, AND APPURTENANT STRUCTURES AND  
FOR DELIVERY OF WATER**

**ARTICLE 1.** This contract, made this 1st day of December nineteen hundred thirty-two, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, between The United States of America, hereinafter referred to as the United States, acting for this purpose by Ray Lyman Wilbur, Secretary of the Interior, hereinafter styled the Secretary, and Imperial Irrigation District, an irrigation district created, organized and existing under and by virtue of the laws of the State of California, with its principal place of business at El Centro, Imperial County, California, hereinafter referred to as the District;

Witnesseth:

**EXPLANATORY RECITALS**

**ART. 2.** Whereas, for the purpose of controlling the floods, improving navigation, and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters for reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary, subject to the terms of the Colorado River Compact, is authorized to construct, operate, and maintain a dam and incidental works in the main stream

of the Colorado River at Black Canyon or Boulder Canyon, adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water, and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary is also authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable as provided in the reclamation law; and

ART. 3. Whereas, after full consideration of the advantages of both the Black Canyon and Boulder Canyon dam sites, the Secretary has determined upon Black Canyon as the site of the aforesaid dam, hereinafter styled the Hoover Dam, creating thereby a reservoir to be hereinafter styled the Boulder Canyon Reservoir; and

ART. 4. Whereas there are included within the boundaries of the District areas of private and public lands, and additional private and public lands will by appropriate proceedings be included within the District, and the District is desirous of entering into a contract for the construction of a suitable diversion dam and main canal and appurtenant structures, hereinafter respectively styled Imperial Dam and All-American Canal, located entirely within the United States connecting with the Imperial and Coachella Valleys, and for the delivery to the District of stored water from Boulder Canyon Reservoir; and

ART. 5. Whereas the Secretary has determined, upon engineering and economic considerations, that it is advisable to provide for the construction of such diversion dam and main canal and appurtenant structures, and has determined that the revenues provided for by this contract are adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of the said diversion dam, main canal, and appurtenant structures in the manner provided in the reclamation law;

ART. 6. Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

CONSTRUCTION BY UNITED STATES

ART. 7. The United States will construct the Imperial Dam in the main stream of the Colorado River at the approximate location indicated on the map marked Exhibit A attached hereto and by this reference made a part hereof, and will also construct the All-American Canal and appurtenant structures to the Imperial and Coachella Valleys, the approximate location of said canal to be as shown on the aforesaid Exhibit A. Said canal shall be constructed to a designed capacity of fifteen thousand (15,000) cubic feet of water per second from and including the diversion and desilting works at said dam to Syphon Drop; thirteen thousand (13,000) cubic feet of water per second from Syphon Drop to Pilot Knob, and ten thousand (10,000) cubic feet of water per second westerly from Pilot Knob to Engineer Station nineteen hundred and seven as said Engineer Station is indicated on said Exhibit A. Other portions of said canal shall be constructed with such capacities as the Secretary may conclusively determine to be necessary or advisable upon engineering or economic considerations to accomplish the ends contemplated by this contract; provided, however, that changes in capacities, locations, lengths and alignments, may be made during the progress of the work as may, in the opinion of the Secretary, whose opinion shall be final and binding upon the parties hereto, be expedient, economical, necessary or advisable, except the capacities above indicated from and including the diversion and desilting works at Imperial Dam to Engineer Station nineteen hundred and seven as hereinabove in this article referred to, which capacities may be changed only by mutual agreement between the Secretary and the District. The ultimate cost to the District of the aforesaid works shall in no event exceed the aggregate sum of thirty-eight million, five hundred thousand dollars (\$38,500,000).

Such cost shall include all expenses of whatsoever kind heretofore or hereafter incurred by the United States from the Reclamation Fund or the Colorado River Dam Fund in connection with, growing out of, or resulting from the construction of said diversion dam, main canal and appurtenant structures, including but not limited to the cost of labor, materials, equipment, engineering, legal work, superintendence, administration, overhead, any and all costs arising from operation and maintenance of said dam, main canal and appurtenant structures prior to the time that said costs are assumed by the District, damage of all kinds and character and rights-of-way as hereinafter provided. The District hereby agrees to repay to the United States expenditures incurred on account of any and all damages due to the existence, operation or maintenance of the diversion dam and main canal, the incurrence of which increases expenditures by the United States beyond said sum of \$38,500,000. The United States will invoke all legal and valid reservations of rights-of-way under acts of Congress, or otherwise reserved or held by it, without cost to the District, except that the United States reserves the right where rights-of-way are thus acquired to reimburse the owners of such lands for the value of improvements which may be destroyed, and the District agrees that the United States may include such disbursements in the cost of the work to be performed hereunder. If rights-of-way are required over an existing project of the Bureau of Reclamation, such sum or sums as may be necessary to reimburse the United States on account of the construction charges allocated to irrigable areas absorbed in such rights-of-way shall also be considered as a part of and be included with other costs of the work to be performed hereunder. The District agrees to convey to the United States without cost, unencumbered fee simple title to any and all lands now owned by it, which, in the opinion of the Secretary may be required for right-of-way purposes for the aforesaid diversion dam, main canal and appurtenant structures. Where rights-of-way within the State of Cali-

fornia are required for the construction of works herein provided for, and such rights-of-way are not reserved to the United States under acts of Congress, or otherwise, or the lands over which such rights-of-way are required are not then owned by the District, the District agrees that it will, upon request of the Secretary, acquire title to such lands, and in turn convey unencumbered fee simple title thereto to the United States at the actual cost thereof to the District, subject to the approval of such cost by the Secretary.

**ASSUMPTION OF OPERATION AND MAINTENANCE BY  
DISTRICT**

ART. 8. Upon sixty (60) days' written notice from the Secretary of the completion of construction of the aforesaid diversion dam, main canal and appurtenant structures, or of any major unit thereof, useful to the District, as determined by the Secretary, whose determination thereof shall be final and binding upon the parties hereto, the District shall assume the care, operation, and maintenance of said diversion dam, main canal and appurtenant structures or major units thereof, including Laguna Dam, and thereafter the District shall at its own cost and without expense to the United States care for, operate, and maintain the same in such manner that such works shall remain in as good and efficient condition and of equal capacity for the diversion, transportation and distribution of water as when received from the United States, reasonable wear and damage by the elements excepted. Operation and maintenance of Imperial Dam by the District is a part of the obligation undertaken under this contract by the District for the transportation and delivery of water to public and Indian lands of the United States, and shall not interfere with the control of such dam by the United States. The United States may, from time to time, in the discretion of the Secretary, resume operation and maintenance of said dam upon not less than 60 days' written notice and require reassumption thereof by the District on

like notice. During such times, after completion, as the dam is operated and maintained by the United States, the District shall on March 1 of each year advance to the United States the estimated cost of operation and maintenance for the following twelve months, upon estimates furnished therefor on or before September 1st next preceding. After the care, operation and maintenance of the aforesaid works have been assumed by the District, the District shall save the United States, its officers, agents and employees harmless as to any and all injury and damage to damage to persons and property which may arise out of the care, operation and maintenance thereof. In the event the United States fails to complete the works herein contemplated and the District fails to elect to make use of the works theretofore partially or wholly constructed, the District shall be fully relieved of any and all responsibility for any further operation and maintenance of the works theretofore taken over by the District for that purpose and thereupon the District shall no longer be responsible for said maintenance or operation or damage to person or property which may arise therefrom.

#### KEEPING DIVERSION DAM, MAIN CANAL AND APPURTEnant STRUCTURES IN REPAIR

ART. 9. Except in case of emergency no substantial change in any of the works to be constructed by the United States and transferred to the District under the provisions hereof shall be made by the District without first having had and obtained the written consent of the Secretary and the Secretary's opinion as to whether any change in any such works is or is not substantial shall be conclusive and binding upon the parties hereto. The District shall promptly make any and all repairs to and replacements of all works constructed hereunder or transferred to it under the terms and conditions hereof, which, in the opinion of the Secretary, are deemed necessary for the proper operation and maintenance of such works. In case of neglect or fail-

ure of the District to make such repairs, the United States may, at its option, after reasonable notice to the District, cause such repairs to be made and charge the actual cost thereof, plus fifteen per centum (15%) to cover overhead and general expense, to the District. On or before September first of each calendar year the United States shall give written notice to the District of the amount expended by the United States for repairs under this article during the twelve-month period immediately preceding. Such cost, plus overhead and general expense as stated above, shall be repaid by the District on March first immediately succeeding.

**AGREEMENT BY DISTRICT TO PAY FOR WORKS  
CONSTRUCTED BY THE UNITED STATES**

ART. 10. (a) The District agrees to pay the United States the actual cost, not exceeding thirty-eight million five hundred thousand dollars (\$38,500,000), incurred by the United States on account of the aforesaid works, subject, however, to the provisions of Article seven (7) hereof; provided, that should Congress fail to make necessary appropriations to complete the work herein provided for, then the Secretary may, at such reasonable time as he may consider advisable, after Congress shall have failed for five consecutive years to make the necessary appropriations which shall have been annually requested by the Secretary, give the District notice of the termination of work by the United States and furnish a statement of the amount actually expended by the United States thereon. Upon the receipt of such notice by the District the District shall be given two years from and after such receipt of notice to elect whether it will utilize said works theretofore constructed, or some particular part thereof. Such election on the part of the District shall be expressed by resolution of the Board of Directors submitted to the electorate of the District for approval or rejection in the manner provided by law for submission of contracts with the United States. If the District elects not to utilize, or fails within said two-

year period to elect to utilize said works or some portion thereof, then the District shall have no further rights therein and no obligations therefor. If the District elects to utilize said works or a portion thereof, then the reasonable value to the District of the works so utilized not exceeding the actual cost thereof to the United States shall be paid by the District under the terms of this contract; the first payment to be due and payable on the first day of March following the first day of September next succeeding the final determination of the reasonable value to the District of such works, in case no further work is done by the District. Should the District elect to complete the work contemplated by this contract, or some portion thereof, the first payment shall be due and payable on the first day of March following the first day of September next succeeding the date of final completion of the work by the District as determined by the Secretary. In determining the value of such works to the District there shall be taken into account, among other things, the method of financing required and cost of money, so that in no event shall all of the works contemplated by this contract cost the District more than they would have cost the District had they all been constructed by the United States under the terms of this contract. In the event of failure of the parties to agree as to the reasonable value to the District of the works which the District elects to use, the same shall be determined as provided in Article twenty-seven (27) hereof.

(b) The District as a whole is obligated to pay to the United States the full amount herein agreed upon regardless of the default or failure of any tract in the District, or of any landowner in the District, in the payment of the assessments levied by the District against such tract or landowner, and the District shall, when necessary, levy and collect appropriate assessments to make up for the default or delinquency of any tract of land or of any landowner in the payment of assessments, so that in any event, and regardless of any defaults or delinquencies in the pay-

ment of any assessment or assessments, the amounts due or to become due the United States shall be paid to the United States by the District when due.

(c) The District shall be divided into units by the Board of Directors of the District. Said units shall be named, commencing with Imperial Unit, which unit shall comprise the lands of the District as of July 1, 1931. Each of the other units shall be as determined by the Board of Directors of the District and shall be described by legal description of the lands embraced therein or by designation of exterior boundaries or otherwise suitable for identification. Additional lands may be added to any unit herein or hereafter designated.

(d) The lands within each unit as hereinabove provided for will be benefited by the works to be constructed under this contract in the proportion that the area within such unit bears to the total area of the District and the costs of the said works, construction and otherwise, shall be apportioned to and paid by the lands within each unit in that proportion. In levying assessments or other charges to meet the cost of the said works, the Board of Directors of the District shall take into consideration payments to be made under this contract, with proper allowance for existing and anticipated delinquencies and redemptions, in order to provide sufficient funds to meet such payments as same become due and said board shall also take into account all sums expended or to be expended under the contract of October 23, 1918, for the right to connect with the Laguna Dam, the cost of all surveys and investigations and other expenditures properly chargeable as a part of the cost of the said works but which are not included as a part of the construction cost thereof reimbursable to the United States under this contract. While the cost of the said works and other expenditures above-mentioned shall be apportioned to the various units according to their respective areas, it is understood that the assessments or other charges to be imposed upon the lands within each

respective unit shall be on an ad valorem or other basis as now or may hereafter be provided by law for assessment or imposition of other charges upon lands within irrigation districts. Rates of assessment or schedule in the various units from year to year or from time to time may be different or unequal as between the various units.

If the amount collected from the lands in any unit in any year shall be less than the amount apportioned to such unit for that year for such purpose, the deficit shall nevertheless be charged to that unit and any fund or funds of the District from which money may be taken to make up such deficit in order to provide for the payment in full of the obligations of the District, shall be entitled to reimbursement for such money from subsequent collections of unpaid assessments or charges in said unit or from the amounts received for the redemption of lands sold for delinquent assessments or charges or from subsequent or additional levies made on the lands within that unit to provide for such reimbursement.

(e) In the event lands now or hereafter within Coachella Valley County Water District, a county water district organized and existing under the laws of the State of California, are included within Imperial Irrigation District, the said Coachella Valley County Water District shall have the privilege, at its option, if, as, and when authorized to do so by law, to pay to Imperial Irrigation District the total amount of any annual and/or special assessments levied by the last named District upon said lands or any installment of such assessments or any of the several individual assessments or installments thereof, in any case as the same become due and payable. The regular and lawful proceedings, rights and remedies of the last named District shall be in no manner impaired or affected by the provisions of this subarticle. The agreement in this subarticle contained is made expressly for the benefit of said Coachella Valley County Water District.

(f) If for any reason only a part of the works herein contemplated is constructed either by the United States or by the District, then the Board of Directors of the District shall, after public hearing, determine whether or not all of the lands in the District are benefited by the works constructed. If the Board shall find and declare that any certain lands within the District are not benefited by such construction, then no assessments shall thereafter be levied upon such lands for the purpose of meeting the obligations under this contract; and, for the purpose of this subarticle, no land shall be regarded as benefited by the construction of such works until the works contemplated by this contract as indicated on said Exhibit A from which water would reasonably be obtained for such lands shall have been constructed.

(g) The District shall have the right to refuse water service to any lands within the District which may at any time be delinquent in the payment of any assessment levied for the purpose of carrying out the provisions of this contract.

#### CHANGES IN DISTRICT BOUNDARIES

ART. 11. After the date of this contract no change shall be made in the boundaries of the District and the Board of Directors shall make no order changing the boundaries of the District, unless and until the Secretary shall assent to such change in writing, and such assent shall have been filed with the Board of Directors of the District; provided, however, that such assent is hereby given for the inclusion of all of the lands indicated on Exhibit A referred to in Article 34 hereof.

#### TERMS OF PAYMENT

ART. 12. The amount herein agreed to be paid to the United States shall be due and payable in not more than forty (40) annual installments commencing with the calendar year next succeeding the year when notice of com-

pletion of all work provided for herein is given to the District or under the provisions of Article 10 (a) hereof upon termination of work through failure of Congress to make necessary appropriations therefor. The first five of such annual installments shall each be one per centum (1%) of the amount herein agreed to be paid to the United States; the next ten of such installments shall each be two per centum (2%) of the amount herein agreed to be paid to the United States, and the remainder of such annual installments shall each be three per centum (3%) of the amount herein agreed to be paid to the United States. The sums payable annually as set forth above shall be divided into two equal semiannual payments, payable on March first and September first of each year; provided, however, that if notice of the completion of work is given to the District subsequent to September first of any year the first semiannual installment of charges hereunder shall be due and payable on March first of the second succeeding year.

#### OPERATION AND MAINTENANCE COSTS

ART. 13. Each agency other than the District for which capacity is provided in the works to be constructed hereunder shall bear such proportionate part of the cost of operation and maintenance (including repairs and replacements) of the component parts thereof and of the Laguna Dam as may be determined by the Secretary to be equitable and just, but not less than an amount in proportion to the total amount as are the relative capacities provided in each component part for such agency and for all other agencies, including the District. Each agency shall advance to the District, on or before January first of each year, its proportionate share of the estimated cost for that year of operation and maintenance in accordance with a notice to be issued by the District, provided that payment shall in no event be due until thirty days after receipt of notice. Prior to March 1st of each year the District shall provide each agency with a statement showing in detail

the costs for the previous year for operation and maintenance of the works on account of which such agency has made advances. Differences between actual costs and estimated costs shall be adjusted in next succeeding notices. Upon request of any agency both the advance notice of estimated costs and the subsequent statement of actual costs for each year shall be reviewed by the Secretary and his determination of proper charges shall be final. Such review shall not change the due date for advance payments as herein provided, and the cost of such review shall be borne equally by the requesting agency and the District. The District may, at its option, withhold the delivery of water from any agency until its proportionate share of the costs of operation and maintenance have been advanced or paid, as in this article provided.

#### POWER POSSIBILITIES

ART. 14. As one of the considerations for the partial termination of the contract of October 23, 1918, as provided for in Article sixteen (16) hereof, the power possibilities on the All-American Canal down to and including Syphon Drop with water carried for the benefit of the Yuma Project as provided for in Article fifteen (15) hereof, are hereby reserved to the United States. Subject to the foregoing provisions of this Article and the participation by other agencies as provided for in Article twenty-one (21) hereof, the District shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal. The net proceeds as hereinafter defined in Article thirty-two (32) hereof and as determined by the Secretary for each calendar year from any such power development shall be paid into the Colorado River Dam Fund on March first of the next succeeding calendar year and be credited to the District on this contract until the District shall have paid thereby and/or otherwise an amount of money equivalent to that herein agreed to be paid to the United States. Thereafter such net power pro-

ceeds shall belong to the District. It is agreed that in the event the net power proceeds in any calendar year, creditable to the District, shall exceed the annual installment of charges payable under this contract during the then current calendar year, the excess of such net power proceeds shall be credited on the next succeeding unpaid installment to become due from the District under this contract.

#### DIVERSION AND DELIVERY OF WATER FOR YUMA PROJECT

ART. 15. As a further consideration for the partial termination of the contract of October 23, 1918, as provided in Article sixteen (16) hereof, the District hereby agrees to divert at the Imperial Dam, and to transport and deliver at Syphon Drop and/or such intermediate points as may be designated by the Secretary, the available water to which the Yuma Project (situated entirely within the United States and not exceeding in area 120,000 acres plus lands lying between the project levees and the Colorado River as such levees are located in 1931) is entitled, not exceeding two thousand (2,000) second-feet of water in the aggregate, or such part thereof as the Secretary may direct, for the use and benefit of said project, including the development of power at Syphon Drop, such water to be diverted, transported and delivered continuously insofar as reasonable diligence will permit, provided, however, that water shall not be diverted, transported or delivered for the Yuma Project when the Secretary notifies the District that said project for any reason may not be entitled thereto; provided, further, that the District shall divert, transport and deliver such water in excess of requirements for irrigation or potable purposes, as determined by the Secretary, on the Yuma Project as so limited, only when such water is not required by the District for irrigation or potable purposes. The diversion, transportation and delivery of water for the Yuma Project as aforesaid shall be without expense to the United States or its successors in

control of said project, as to capital investment required to provide facilities for such diversion and transportation of water, except such checks, turnouts and other structures required for delivery from said canal.

CONTRACT OF OCTOBER 23, 1918

ART. 16. That certain contract between the United States of America and the District, bearing date of October 23, 1918, providing for a connection with Laguna Dam, is hereby terminated, except as to the provisions of Article nine (9) thereof, and as one of the considerations for the partial termination of said contract by the United States, the District hereby promises and agrees to make full payment to the United States of all unpaid installments of charges as provided in Article nine (9) of said agreement, anything in said contract to the contrary notwithstanding. As an additional consideration for the partial termination of said contract of October 23, 1918, the District hereby promises and agrees to furnish to the United States or its successors in interest in the control, operation, and maintenance of the Yuma Project, from any power development on the All-American Canal at or near Pilot Knob, up to but not to exceed four thousand horsepower of electrical energy for use by the agency in charge of project operations for irrigation and drainage pumping purposes and necessary incidental use on said Yuma Project, such power to be furnished at cost (including overhead and general expense) plus ten per cent; provided, however, that the District shall not be required to furnish such power at or near Pilot Knob except at such times as all power feasible of development at Syphon Drop or developed elsewhere within a radius of 40 miles from the city of Yuma for the benefit of the Yuma project is being used for Project operations as in this article specified.

DELIVERY OF WATER BY UNITED STATES

ART. 17. The United States shall, from storage available in the reservoir created by Hoover Dam, deliver to the

District each year at a point in the Colorado River immediately above Imperial Dam, so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use within the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California, as follows (subject to availability thereof for use in California under the Colorado River Compact and the Boulder Canyon Project Act):

The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

SECTION 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

SEC. 2. A second priority to Yuma Project of the United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

SEC. 3. A third priority (a) to Imperial Irrigation District, and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the prior-

ties designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2, and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

SEC. 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum.

SEC. 5. A fifth priority (e) to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

SEC. 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

SEC. 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

SEC. 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre-feet in the aggregate) by reason of reduced diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release, and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

SEC. 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulations, retention, release, and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users resulting therefrom.

SEC. 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.

SEC. 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

SEC. 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties.

The Secretary reserves the right to, and the District agrees that he may, contract with any of the allottees above named in accordance with the above stated recommendation, or, in the event that such recommendation as to Palo Verde Irrigation District is superseded by an agreement between all the above allottees or by a final judicial determination, to contract with the Palo Verde Irrigation District in accordance with such agreement or determination; *Provided*, that priorities numbered fourth and fifth shall not thereby be disturbed.

As far as reasonable diligence will permit said water shall be delivered as ordered by the District, and as reasonably required for potable and irrigation purposes within the boundaries of the District in the Imperial and Coachella Valleys in California. This contract is for permanent water services but is subject to the condition that Hoover Dam and Boulder Canyon Reservoir shall be used: First, for river regulation, improvement of navigation, and flood

control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the District and the United States shall observe and be subject to, and controlled by said Colorado River Compact in the construction, management and operation of Hoover Dam, Imperial Dam, All-American Canal, and other works and the storage, diversion, delivery and use of water for the generation of power, irrigation, and other purposes. The United States reserves the right to temporarily discontinue or reduce the amount of water to be delivered for the purpose of investigation, inspection, maintenance, repairs, replacements or installation of equipment and/or machinery at Hoover Dam, but as far as feasible the United States will give the District reasonable notice in advance of such temporary discontinuance or reduction. The United States, its officers, agents and employees shall not be liable for damages when, for any reason whatsoever, suspension or reductions in delivery of water occur. This contract is without prejudice to any other or additional rights which the District may now have not inconsistent with the foregoing provisions of this article, or may hereafter acquire in or to the waters of the Colorado River. Nothing in this contract shall be construed to prevent the District from diverting water to the full capacity of the All-American Canal if and when water over and above the quantity apportioned to it hereunder is available, and no power development at Imperial and/or Laguna Dam shall be permitted to interfere with such diversion by the District, but, except as provided in Article twenty-one (21), water shall not be diverted, transported or carried by or through the works to be constructed hereunder for any agency other than the District, except by written consent of the Secretary.

**MEASUREMENT OF WATER**

**ART. 18.** The water which the District receives under the apportionment as provided in Article seventeen (17) hereof shall be measured at such point or points on the canal as may be designated by the Secretary. Measuring and controlling devices shall be furnished and installed by the United States as a part of the work provided for herein, but shall be operated and maintained by and at the expense of the District. They shall be and remain at all times under the complete control of the United States, whose authorized representatives may at all times have access to them over the lands and rights-of-way of the District.

**RECORD OF WATER DIVERTED**

**ART. 19.** The District shall make full and complete written reports as directed by the Secretary, on forms to be supplied by the United States, of all water diverted from the Colorado River, and the disposition thereof. The records and data from which such reports are made shall be accessible to the United States on demand of the Secretary.

**REFUSAL OF WATER IN CASE OF DEFAULT**

**ART. 20.** The United States reserves the right to refuse to deliver water to the District in the event of default for a period of more than twelve (12) months in any payment due the United States under this contract, or, in the discretion of the Secretary to reduce deliveries in such proportion as the amount in default by the District bears to the total amount due. It is understood, however, that the provisions of this article shall not relieve the District of its obligation to divert, transport and deliver water for the use and benefit of the Yuma Project as herein elsewhere provided, nor shall it relieve the District of its obligation hereunder to divert, transport and deliver water for the use and benefit of other agencies with whom the United States may contract for the diversion, transportation and

delivery of water through or by the works to be constructed under the terms hereof. The United States further reserves the right to forthwith assume control of all or any part of the works to be constructed hereunder and to care for, operate and maintain the same, so long as the Secretary deems necessary or advisable, if, in his opinion, which shall be final and binding upon the parties hereto, the District does not carry out the terms and conditions of this contract to their full extent and meaning. In such event, the District's pro rata share of the actual cost of such care, operation and maintenance by the United States shall be repaid to the United States, plus fifteen per centum (15%) to cover overhead and general expense, on March first of each year immediately succeeding the calendar year during which the works to be constructed hereunder are operated and maintained by the United States. Nothing herein contained shall relieve the District of the obligation to pay in any event all installments and penalties provided in this contract.

#### USE OF WORKS BY THE UNITED STATES AND OTHERS

ART. 21. The United States also reserves the right to, and the District agrees that it may, at any time prior to the transfer of constructed works to the District for operation and maintenance, increase the capacity of the said works and contract for such increased capacity with other agencies for the delivery of water for use in the United States; provided, however, that such other agencies shall not thereby be entitled to participate in power development on said All-American Canal, except at points where and to the extent that the water diverted and/or carried for them contributes to the development of power. In the event other agencies thus contract with the United States, each of such agencies shall assume such proportion of the total cost of said works to be used jointly by such agency and the District, including Laguna Dam, as the Secretary may determine to be equitable and just but not less than the proportion that the capacity provided for such agency

in such works bears to the total capacity thereof (except in that part thereof above Syphon Drop including Laguna Dam, in which part the proportion which such other agency shall assume shall be not less than the proportion that the capacity provided for such agency therein bears to the total capacity thereof less the capacity to be provided hereunder without cost to and for the Yuma Project) and the District's financial obligations under this contract shall be adjusted accordingly. In no event shall construction costs chargeable to the District be increased by reason of additional capacity being provided for any such agency or agencies or contract or contracts having been made with same. Any such agency thus contracting shall also be required to reimburse the District in such amounts and at such times as the Secretary may determine to be equitable and just for payments theretofore made by the District for the right to use Laguna Dam.

#### TITLE TO REMAIN IN THE UNITED STATES

ART. 22. Title to the aforesaid Imperial Dam and All-American Canal to be constructed by the United States under the terms and conditions hereof, shall be and remain in the United States notwithstanding transfer of the care, operation, and maintenance thereof to the District; provided, however, that the Secretary may, in his discretion, when repayments to the United States of all moneys advanced shall have been made, transfer the title to said main canal and appurtenant structures, except the diversion dam and the main canal and appurtenant structures down to and including Syphon Drop, to the District or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form or organization as may be acceptable to him.

#### ASSESSMENT OF PUBLIC LAND

ART. 23. The following lands are hereby designated as subject to the provisions of the act of August 11, 1916 (39

Stat. 506), and the act of May 15, 1922 (42 Stat. 541):

- (a) All unentered public lands and entered lands for which no final certificate has been issued, situate within the District at the date hereof; and when included within the District, unentered public lands and entered lands for which no final certificate has been issued, hereafter to be included within the District pursuant to this contract, all described in a statement marked "Exhibit B" attached hereto and by reference thereto made a part hereof; and
- (b) Unentered public lands and entered lands for which no final certificate has been issued not so described but hereafter annexed to the District, upon the Secretary's consenting, in the case of such lands hereafter annexed to the District, to assessment hereunder of such added lands, which consent will be requested by resolution of the Board of Directors of the District and will be manifested by letter filed with the District, a copy of such letter to be filed also with the General Land Office, and a copy with the proper local Land Office.

Within a reasonable time, to be determined by the Secretary, from the date water is available for and can be delivered to any public lands within the boundaries of the District, such lands shall be opened to entry.

#### RULES AND REGULATIONS

ART. 24. There is reserved to the Secretary the right to prescribe and enforce rules and regulations not inconsistent with this contract, governing the diversion and delivery of water hereunder to the District and to other contractors. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the District and opportunity for it to be heard, as may be deemed proper, necessary or desirable by the Secretary to carry out the true intent and meaning of the law and of this contract, or amendments thereof, or to protect the interests of the United States. The District hereby agrees

that in the operation and maintenance of the Imperial Dam and All-American Canal, all such rules and regulations will be fully adhered to.

#### INSPECTION BY THE UNITED STATES

ART. 25. The Secretary may cause to be made from time to time a reasonable inspection of the works constructed by the United States under the terms hereof to the end that he may ascertain whether the terms of this contract are being satisfactorily executed by the District. The actual expense of such inspection in any calendar year, as found by the Secretary, shall be paid by the District to the United States on March first of each year immediately following the year in which such inspection is made, and upon statement to be furnished by the Secretary. The Secretary or his representative shall at all times have the right of ingress to and egress from all works of the District for the purpose of inspection, repairs, and maintenance of works of the United States, and for all other purposes.

#### ACCESS TO BOOKS AND RECORDS

ART. 26. The officials or designated representatives of the District shall have full and free access to the books and records of the United States, so far as they relate to the matters covered by this contract, with the right at any time during office hours to make copies of and from the same; and the Secretary shall have the same right in respect of the books and records of the District.

#### DISPUTES OR DISAGREEMENTS

ART. 27. Disputes or disagreements as to the interpretation or performance of the provisions of this contract, except as otherwise provided herein, shall be determined either by arbitration or court proceedings, the Secretary being authorized to act for the United States in such proceedings. Whenever a controversy arises out of this contract, and the parties hereto agree to submit the matter to arbitration, the District shall name one arbitrator and the

Secretary shall name one arbitrator, and the two arbitrators thus chosen shall elect three other arbitrators, but in the event of their failure to name all or any of the three arbitrators within thirty (30) days after their first meeting, such arbitrators not so elected, shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit. The decision of any three of such arbitrators shall be a valid and binding award of the arbitrators.

#### INTEREST AND PENALTIES

ART. 28. No interest shall be charged on any installments of charges due from the District hereunder except that on all such installments or any part thereof, which may remain unpaid by the District to the United States after the same become due, there shall be added to the amount unpaid a penalty of one-half of one per centum ( $\frac{1}{2}\%$ ) and a like penalty of one-half of one per centum ( $\frac{1}{2}\%$ ) of the amount unpaid shall be added on the first day of each month thereafter so long as such default shall continue.

#### AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

ART. 29. This contract is made upon the express condition and with the express understanding that all rights based upon this contract shall be subject to and controlled by the Colorado River Compact, being the compact or agreement signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," which compact was approved by the Boulder Canyon Project Act.

## APPLICATION OF RECLAMATION LAW

ART. 30. Except as provided by the Boulder Canyon Project Act, the reclamation law shall govern the construction, operation, and maintenance of the works to be constructed hereunder.

CONTRACT TO BE AUTHORIZED BY ELECTION AND  
CONFIRMED BY COURT

ART. 31. The execution of this contract by the District shall be authorized by the qualified electors of the District at an election held for that purpose. Thereafter, without delay, the District shall prosecute to judgment proceedings in court for a judicial confirmation of the authorization and validity of this contract. The United States shall not be in any manner bound under the terms and conditions of this contract unless and until a confirmatory final judgment in such proceedings shall have been rendered, including final decision, or pending appellate action if ground for appeal be laid. The District shall without delay and at its own cost and expense furnish the United States for its files, copies of all proceedings relating to the election upon this contract and the confirmation proceedings in connection therewith, which said copies shall be properly certified by the Clerk of the Court in which confirmatory judgment is obtained.

## METHOD OF DETERMINING NET POWER PROCEEDS

ART. 32. In determining the net proceeds for each calendar year from any power development on the All-American Canal, to be paid into the Colorado River Dam Fund as provided in Article fourteen (14) hereof, there shall be taken into consideration all items of cost of production of power, including but not necessarily limited to amortization of and interest on capital investment in power development, replacements, improvements, and operation and maintenance, if any. Any other proper factor of cost not here expressly enumerated may be taken into account in determining the net proceeds.

## CONTINGENT UPON APPROPRIATIONS

ART. 33. This contract is subject to appropriations being made by Congress from year to year of moneys sufficient to do the work provided for herein, and to there being sufficient moneys available in the Colorado River Dam Fund to permit allotments to be made for the performance of such work. No liability shall accrue against the United States, its officers, agents or employees, by reason of sufficient moneys not being so appropriated nor on account of there not being sufficient moneys in the Colorado River Dam Fund to permit of said allotments. If more than three years elapse after this contract becomes effective and before appropriations are available to permit the United States to make expenditures hereunder, the District may, at its option, upon giving sixty (60) days' written notice to the Secretary, cancel this contract. Such option shall be expressed by vote of the electors of the District with the same formalities as required for the authorization of contracts with the United States.

## INCLUSION OF LANDS

ART. 34. (a) In this article where the words "area to be included" are used such words shall be understood to mean those certain areas shown on Exhibit A and bounded by the lines indicated thereon as "Boundary of Additional Areas in Proposed Enlarged Imperial Irrigation District."

(b) The District agrees to change its boundaries within a reasonable time after the execution of this contract, in the manner provided by law, so as to include within the District the public lands of the United States in Imperial County lying south of the northerly boundary line of Township eleven (11) South of the San Bernardino Base Line, and within the area to be included.

(c) The District further agrees to change its boundaries, if lawful petition or petitions therefor be presented to its

Board of Directors prior to the first day of January 1940, so as to include within the District any privately owned and/or entered lands for which final certificate has not been issued, in Imperial County, lying south of the northerly boundary line of Township eleven (11) South of the San Bernardino Base Line, and within the area to be included.

(d) The District further agrees to change its boundaries, in the manner provided by law, so as to include within the District the lands lying north of the northerly boundary line of Township eleven (11) South of the San Bernardino Base Line, and within the area to be included, if lawful petition or petitions sufficient in all respects for such inclusion be presented to its Board of Directors at any time prior to the expiration of thirty days from and after the date on which a confirmatory judgment, as required by Article 31 hereof, declaring this contract in all respects valid and duly authorized, shall have become final; provided, however, that the District shall not change its boundaries so as to include any of said lands lying north of the northerly boundary line of said Township eleven (11) South, unless the said petition or petitions so filed shall be sufficient to lawfully include in the aggregate not less than ninety per centum (90%) (the areas to be approved by the Secretary) of the said lands, exclusive of the Dos Palmas area and exclusive of Indian lands and public lands of the United States. Within a reasonable time after the inclusion of such lands pursuant to said petition or petitions the District further agrees to change its boundaries, in the manner provided by law, so as to also include within the District the public lands of the United States within the area to be included and lying north of the northerly boundary line of said Township eleven (11) South.

(e) Whenever any of the lands within the area to be included are included within the District the inclusion thereof shall be made upon conditions substantially as hereinafter contained (filling blank spaces with appropriate unit names as may be required and other proper designa-

tions), and the Secretary, on behalf of the United States, hereby consents to such inclusion and conditions, which conditions are as follows:

#### CONDITION NO. 1

##### DEFINITIONS

In the following conditions, the word "District" shall mean Imperial Irrigation District; the word "Board" shall mean the Board of Directors of Imperial Irrigation District; the words "All-American Canal Contract" shall mean that certain contract between the United States of America by Ray Lyman Wilbur, Secretary of the Interior, and Imperial Irrigation District, dated \_\_\_\_\_,

(date of this contract)

and entitled "Contract for construction of diversion dam, main canal and appurtenant structures and for Delivery of Water," authorized by the electors of Imperial Irrigation District at an election held \_\_\_\_\_;

(date of this contract authorized)

and the words "distribution system" shall mean the secondary main canal and lateral system or systems, including all canals, pipe lines, structures, pumping plants, machinery and incidental works necessary or convenient under the rules and regulations of Imperial Irrigation District for delivery of water for irrigation and domestic purposes from the All-American Canal, as the same is shown on Exhibit "A" attached to and made a part of said All-American Canal Contract, to lands in \_\_\_\_\_, (name)

Unit as such unit is hereinafter defined.

#### CONDITION NO. 2

##### DIVISION INTO UNITS

For the purposes of these conditions and in compliance with the terms of the All-American Canal Contract, the

District shall be divided into units, commencing with Imperial Unit, which unit shall comprise the lands within the District as of July 1, 1931, and such other lands as may at any time or from time to time be added thereto in the discretion of the Board.

----- Unit shall comprise  
 (name) -----  
 -----  
 -----

(there shall follow description or other designation of the unit involved as provided by Article 10 (c) of the All-American Canal Contract)

### CONDITION NO. 3

#### ALL-AMERICAN CANAL CONTRACT

The Lands within \_\_\_\_\_ Unit shall be, in  
 (name) all respects, bound by all of the terms and conditions of the All-American Canal Contract and particularly by Article 10 thereof, and shall pay, as a unit obligation, the several amounts and in the manner and at the times provided for in said contract, as the Board may determine; provided, that said lands in \_\_\_\_\_ Unit shall

(name)

pay to the District, as a unit obligation, that proportion of the total sum paid by the District to the United States under that certain contract of October 23, 1918, between the United States and the District for the right to connect with Laguna Dam, prior to the payment of the first installment on said contract of October 23, 1918, for which said land shall be assessed, that the total area of

\_\_\_\_\_ Unit bears to the total area of the  
 (name)

District at the date notice of completion of all work provided for in the All-American Canal Contract shall be given, pursuant to Article 12 thereof, to the District. Said sum shall be divided into ten annual installments, as nearly equal as may be practicable, and paid, commencing with the calendar year next succeeding the calendar year when such notice of completion shall be so given.

CONDITION NO. 4  
DISTRIBUTION SYSTEM

The Lands within \_\_\_\_\_ Unit shall  
(name)  
pay, as a unit obligation, the total capital cost of any distribution system which may be constructed by or under authority of the District, to serve the lands within said \_\_\_\_\_ Unit or any part thereof. When  
(name)  
said distribution system, or any part thereof, is constructed, or an obligation therefor is incurred, said lands shall pay annually, such sum or sums as may be necessary to meet the then current obligation therefor, whether for principal or interest or both, or otherwise. Said distribution system shall at all times be and remain the exclusive property of the District unless the District shall provide otherwise, in the discretion of the Board. When funds for the construction of said distribution system are made available, the District shall construct or authorize the same to be constructed, as the Board may determine.

CONDITION NO. 5  
PUMPING COSTS

The Board shall provide by rule for the payment by the lands served of the cost of power required to pump water to or for the use of such lands.

CONDITION NO. 6  
CHARGES TO BE PART OF ASSESSMENT

Any and all charges against or upon the lands within \_\_\_\_\_ Unit provided for by the foregoing  
(name)  
conditions unless otherwise collected from the lands within \_\_\_\_\_ Unit shall be a part of, but in  
(name)

addition to, the annual assessment upon the said lands for other District purposes and payable in installments accordingly, and shall constitute an additional annual charge upon the land, and the Board shall levy such assessment upon the said lands upon an ad valorem or other basis as now or hereafter provided by law, in an amount or in amounts sufficient to raise the several sums provided for from the said lands within \_\_\_\_\_ Unit;

provided, that for the protection of the interests and security of the United States, pending completion of construction of the All-American Canal to such extent that water is available in said canal for use in \_\_\_\_\_ Unit, the annual assessment

upon the lands within said unit for District purposes shall be limited to raise only the just proportion chargeable to said unit for expenditures connected with or applying to the All-American Canal and/or arising from expenditures made in or on behalf of said unit.

(f) In the event petition or petitions for inclusion, pursuant to this article, of any privately owned lands or entered lands for which no final certificate has at the time been issued, lying south of the northerly boundary line of Township eleven (11) South of the San Bernardino Base Line, and within the area to be included, be presented subsequent to the expiration of thirty days from and after the date on which a confirmatory judgment, as required by Article 31 hereof, declaring this contract in all respects valid and duly authorized, shall have become final, then the District may in the discretion of the the Board of Directors require as a condition precedent to the granting of said petition or petitions and in addition to the other conditions above named, that the petitioners shall pay to the District such respective sums as nearly as the same can be estimated (the amounts to be determined by the Board) as the holders of title or evidence of title to the several parcels of land involved in said petition or petitions

and their grantors would have been required to pay to the District as assessments had such lands been included within the District at the expiration of said 30-day period, or such portion of said sum as the Board of Directors may at the time determine. The provisions of this sub-article shall also apply to all lands lying north of the northerly boundary line of said Township eleven (11) South, and within the area to be included, provided the ninety per centum (90%) petition required by sub-article (d) of this article is filed prior to the expiration of said 30-day period.

(g) In the event that petition or petitions for inclusion of the said lands lying north of the northerly boundary line of said Township eleven (11) South of the San Bernardino Base Line, as in sub-article (d) above provided are not made and filed with the Board of Directors of the District prior to the expiration of thirty days from and after the date on which a confirmatory judgment, as required by Article 31 hereof, declaring this contract in all respects valid and duly authorized, shall have become final, as hereinabove provided, then said lands shall not thereafter be included within the District under the provisions of this contract and the works referred to in this contract north of the northerly boundary line of said Township eleven (11) South of the San Bernardino Base Line shall not be constructed under this contract and the District shall be relieved from all responsibility therefor, anything in this contract to the contrary notwithstanding, and the capacities in the works to be constructed under this contract, shall be reduced accordingly.

(h) Northing contained in this contract shall impair any right or remedy of any person entitled to object or protest against the inclusion within the District of any particular tract or tracts of land, or the conditions imposed by the Board of Directors of the District on the inclusion of any particular tract or tracts, nor impair the power of the Board to hear and determine any such objections or pro-

tests, but if in the opinion of the Secretary such determination by the Board substantially impairs the interests of, or security otherwise available to, the United States under this contract, then and in such event the United States shall be under no obligation to proceed further under this contract. In the event any petition or petitions be filed for the inclusion within the District of any lands within the area to be included and, after the conditions set out in sub-article (e) of this article, or conditions less burdensome, are imposed thereon, a sufficient majority statement or statements in writing be filed objecting to the inclusion of such lands with the conditions imposed thereon, so that the Board of Directors is required to dismiss such petition or petitions, then it shall be regarded as if such petition or petitions had not been filed.

#### **PRIORITY OF CLAIMS OF THE UNITED STATES**

**ART. 35.** Claims of the United States arising out of this contract shall have priority over all others, secured and unsecured.

#### **RIGHTS RESERVED UNDER SECTION 3737 REVISED STATUTES**

**ART. 36.** All rights of action for breach of any of the provisions of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

#### **REMEDIES UNDER CONTRACT NOT EXCLUSIVE**

**ART. 37.** Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States or the District of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provision hereof or of a subsequent breach of such provision.

INTEREST IN CONTRACT NOT TRANSFERABLE

ART. 38. No interest in this contract is transferable by the District to any other party, and any such attempted transfer shall cause this contract to become subject to annulment at the option of the United States.

MEMBER OF CONGRESS CLAUSE

ART. 39. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In witness whereof the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,  
By RAY LYMAN WILBUR,  
*Secretary of the Interior.*

Attest:

NORTHCUTT ELY.  
ELWOOD MEAD.  
IMPERIAL IRRIGATION DISTRICT,  
By JOHN L. DUBOIS,  
*President.*

Attest:

[SEAL]

F. H. MCIVER, Secretary.

EXHIBIT B

UNENTERED PUBLIC LANDS AND ENTERED LANDS FOR WHICH  
NO FINAL CERTIFICATE HAS BEEN ISSUED

(Omitted because of limitations of space. Comprises legal descriptions of lands of these categories shown on map, Exhibit A, annexed.)

APPENDIX Q  
THE SECRETARY OF THE INTERIOR  
Washington

February 24, 1933

Imperial Irrigation District,  
El Centro, California

Gentlemen:

Information at hand indicates that in connection with the contract with your district signed by me on behalf of the United States under date of December 1, 1932, some question has been raised concerning the maximum area of land in single ownership that may be irrigated from the proposed All-American Canal. My attention has been specifically called to the suit now pending in the Superior Court of Imperial County, California entitled *Malan v. Imperial Irrigation District et al.* Among other things the complaint in this case contains the following allegation:

"And it is further provided by the reclamation law of the United States that water shall not be delivered from any canal so constructed by the Secretary of the Interior under the said reclamation law to any land-owner owning more than 160 acres of land."

The foregoing is an inaccurate statement of the reclamation law in this respect. Presumably this allegation is intended to refer to section 5 of the reclamation act of June 17, 1902, which reads in part as follows:

"No right to the use of water for land in private ownership shall be *sold* for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bone fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made." (Emphasis supplied).

It will be noted that while the reclamation law provides that no water shall be *sold* for a tract of land in excess of

160 acres in single ownership, it does not provide, as alleged, that no water shall be delivered from a canal constructed by the Government to any tract exceeding 160 acres in area. The All-American Canal contract with the Imperial Irrigation District does not provide for the sale of storage water for use in the Imperial and Coachella Valleys. The contract, in article 17, provides merely for the delivery of water for use in these valleys through the works to be constructed by the United States. No charge whatever is made for the water so to be delivered, and under the provisions of the Boulder Canyon Project Act no such charge can legally be made. From section 1 of this act for convenient reference the following is quoted:

"Provided, however, that no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys."

Early in the negotiations connected with the All-American Canal contract, the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.

In connection with the activities of the Bureau of Reclamation it has been held that the provisions of section 5 of the reclamation act restricting the sale of a right to use water for land in private ownership to not more than 160 acres will not prevent the recognition of a vested water

right for a larger area, and protection of the same by allowing the continued flowage of the water covered by the right through the works constructed by the Government. (Opinion of Assistant Attorney General, 34 L.D. 351; Anna M. Wright, 40 L.D. 116).

On many projects it has been the practice to recognize vested rights in single ownership in excess of 160 acres and to deliver the water necessary to satisfy such rights through works constructed by and at the expense of the Government. This is true of the Newlands project, the North Platte project, the Umatilla project, and others.

The provision quoted from section 5 of the reclamation act relates to land in private ownership. This of course would not apply to the tributary public lands to be included within the boundaries of the district. While this particular provision would not be applicable to the public lands, they would be governed by section 4 of the reclamation act and other provisions which limit the area of public lands, that may be entered to a farm unit required for the support of a family. This area will be such as may be fixed by the Secretary, consisting of not less than 10 nor more than 160 acres. (Section 9 of the Boulder Canyon Act and Act of June 27, 1906, 34 Stat. 519).

The foregoing has been long settled by decisions of the Department and by the practice in carrying such decisions into effect.

Sincerely yours,  
/s/ RAY LYMAN WILBUR,  
Secretary

**APPENDIX R**

Regulations appearing at 38 L.D. 637 (1910) provide:

**VESTED WATER RIGHTS.**

45. The provision of section 5 of the reclamation act limiting the area for which the use of water may be sold does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges.

Similarly, regulations appearing at 43 C.F.R. § 230.70 provide:

**Vested Water Rights**

§230.70. *Recognition of vested rights to water.* The provision of section 5 of the act of June 17, 1902 (32 Stat. 389; 43 U.S.C. 381, 392, 431, 439), limiting the area for which the use of water may be sold, does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges.

**APPENDIX S**  
**DEPARTMENT OF THE INTERIOR**

**Bureau of Reclamation**  
[43 CFR Part 426]  
**ACREAGE LIMITATION**  
**Reclamation Rules and Regulations**

**AGENCY:** Bureau of Reclamation, Interior

**ACTION:** Proposed rule

**SUMMARY:** The Bureau of Reclamation, Department of the Interior, proposes to issue rules and regulations establishing policies and procedures to meet the Secretary's responsibilities in administering the acreage limitation and other provisions of reclamation law. These proposed rules are issued in response to the order of the United States District Court for the District of Columbia in the case of National Land for People, Inc. v. The Bureau of Reclamation, et al., Civil Action No. 76-928. The Department believes that these new regulations will enable the Department to meet fully the mandates of reclamation law.

**DATES:** Comment Period: November 23, 1977.

**ADDRESS:** Comments should be submitted to the Commissioner, Bureau of Reclamation, Department of the Interior, 18th and C Streets NW., Washington, D.C. 20240, Attention: Code 410.

**FOR FURTHER INFORMATION CONTACT:**

Mr. Vernon S. Cooper, Special Projects Officer, Division of Water and Land, Bureau of Reclamation (202) 343-5104.

**SUPPLEMENTAL INFORMATION:** It is the policy of the Department of the Interior to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments, suggestions, or objections regarding the proposed

regulations to the Bureau of Reclamation. Comments must be received on or before November 23, 1977. Public hearings on the proposed regulations will be scheduled as demand warrants. The Department requests that those interested in public hearings immediately notify in writing the Commissioner of the Bureau of Reclamation or the nearest Bureau of Reclamation office with suggestions for hearing places. The hearings will then be scheduled, and the public notified, in a later edition of the **FEDERAL REGISTER**.

On August 13, 1976, the United States District Court for the District of Columbia in the case of "National Land for People, Inc. v. The Bureau of Reclamation, et al.," Civil Action No. 76-928, ordered the Department of the Interior to "forthwith initiate public rulemaking proceedings \* \* \* respecting the criteria and procedures to be used by the Bureau of Reclamation, Department of the Interior, to approve 'excess lands' sales under the Federal Reclamation Laws." These proposed rules are in response to this court order.

The proposed regulations embody several important changes in current practices to enforce the excess land (160 acre limitation) and other reclamation laws. They define more specifically the procedures by which excess lands should be sold and who can qualify as purchasers, to fulfill the purpose of reclamation law that low-priced federal water be used as a means of encouraging the establishment of genuine small family farms. The principal changes are as follows:

(1) All new purchasers of excess land benefiting from low-priced federal water must live on or in the neighborhood of the land benefited. Because the regulations address only excess lands, they do not make residency a general requirement for any land served with low-cost federal water pursuant to the reclamation laws. Residency is, however, believed to be a legally required condition of

receiving federally-subsidized water, and regulations spelling out how the residency requirement will be reimplemented across-the-board will be prepared as soon as practicable. These rules will outline the procedure by which those landowners who now benefit from low-cost federal water, but who do not live on or in the neighborhood of their land, will be allowed a period of time to bring themselves into compliance while still receiving the low-cost federal water. Such a period of adjustment is deemed appropriate because of the failure to enforce the requirement for many years.

(2) The criteria for determining qualified purchasers of excess land are tightened, to prohibit multiple ownerships (such as partnerships or trusts) except where there is a family relationship among the owners.

(3) The regulations discourage speculation by allowing the Department to exercise continuing supervision over the sale price of land after it is sold into non-excess status. This reverses the current practice of allowing an excess land purchaser to realize the windfall profits represented by low-priced federal water in an immediate resale.

(4) The proposed regulations place some limitations on the leasing of both excess and nonexcess lands benefited by low-priced federal water, in order to promote farm operations by the actual owners.

(5) The regulations alter the procedures by which excess lands are sold, to allow a large number of prospective purchasers a better opportunity to participate in the reclamation program. For example, the past practice of allowing an excess land seller to arrange privately for sale is abolished. The Department will announce the availability of such lands, and choose among prospective purchasers by lottery or other impartial means.

In connection with these proposed regulations, it should be noted that, pursuant to Pub. L. 95-46, the Department

has created a Task Force to study the San Luis Unit of the Central Valley Project in California. The Task Force's report, due January 1, 1978, will include among the other things a study of the excess land law's operation in that area, and may make recommendations to the Department and to the Congress regarding the excess land and residency portions of the reclamation law.

The Department intends to act promptly to promulgate final regulations once public comment has been received and digested and appropriate modifications made. On June 27, 1977, the Secretary ordered a halt to the processing of all excess land sales and the signing of new recordable contracts until final regulations are promulgated, and the Department is also under a court order to promulgate such regulations "forthwith." Therefore, the Department intends to proceed as expeditiously as possible once full opportunity for public comment has been given. For this reason, the Department does not expect to grant any extensions beyond the already generous 90-day comment period.

The primary authors of this document are: John D. Leshy, Associate Solicitor, Energy and Resources, Washington, D.C. (202) 343-5757; John C. McDowell, Deputy Associate Solicitor, Energy and Resources, Washington, D.C. (202) 343-4325; Nicholas P. Goschy, Attorney, Energy and Resources, Washington, D.C. (202) 343-4444; Vernon S. Cooper, Special Projects Officer, Division of Water and Land, Washington, D.C. (202) 343-5104; and Michael S. Hacskaylo, Realty Specialist (Excess Land), Division of Water and Land, Washington, D.C. (202) 343-5104.

It is hereby determined that the publication of this proposed regulation will not significantly affect the quality of the human environment and that no environment impact statement pursuant to section 102(2) (c) of the National

Environmental Policy Act, 42 U.S.C. Section 4332(c) is required.

NOTE: The Department of the Interior has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821 as amended by Executive Order 11949 and OMB Circular A-107.

Dated: August 22, 1977.

**GUY R. MARTIN,**

*Assistant Secretary of the Interior.*

Pursuant to the authority of the Secretary of the Interior contained in the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 552, 553 and in the Reclamation Act of 1902, as amended and supplemented, 32 Stat. 388, 43 U.S.C. 371 et seq., it is hereby proposed to establish a new Part 426 of Title 43 to read as follows:

## **PART 426—RECLAMATION RULES AND REGULATIONS FOR ACREAGE LIMITATION**

**Sec.**

- 426.1 Objectives.
- 426.2 Effective date, applicability.
- 426.3 Authority.
- 426.4 Definitions.
- 426.5 Deliveries of project water to excess land under special circumstances.
- 426.6 Lands not eligible to receive project benefits.
- 426.7 Types of land ownership.
- 426.8 Leases.
- 426.9 Nonexcess land.
- 426.10 Disposition of excess lands.
- 426.11 Commingling.
- 426.12 Appraisals of excess land.
- 426.13 Class 1 equivalency.
- 426.14 Decisions and appeals.

**AUTHORITY:** Administrative Procedure Act, 60 Stat. 237, (5 U.S.C. 552, 553), Reclamation Act of 1902, as amended and supplemented, 32 U.S.C. 371, et seq.

### **§ 426.1 Objectives.**

The Reclamation Act policies of limiting the area of land for which project water may be supplied and requiring the

landowner to reside on or in the neighborhood of the land benefited are designed:

- (a) To provide opportunity for a maximum number of farmers on the land.
- (b) To distribute widely the benefits from public-supported reclamation because interest-free money and low-priced water are involved.
- (c) To promote the family-size owner-operated farm.
- (d) To preclude the accrual of speculative gain in the disposition of excess land.

**§ 426.2 Effective date, applicability.**

- (a) These regulations shall become effective upon publication in the **FEDERAL REGISTER** as final rulemaking.
- (b) These regulations apply to all existing excess lands, including those now under recordable contract. Among other things, they define, consistent with but with greater specificity than existing recordable contracts, both those persons qualified to purchase excess lands (as provided in standard recordable contracts) and those procedures to be used in disposing of excess lands. These regulations shall not apply to existing repayment, water service and recordable contracts only to the extent there is a clear, specific and irreconcilable conflict between these regulations and existing valid contracts which are not otherwise inconsistent with the reclamation laws.
- (c) Persons who own lands (1) served by more than one Federal project subject to reclamation laws or (2) located in more than one district, the total of which exceeds the acreage limitation, shall have one year from the effective date of these regulations to sign a recordable contract for the sale of excess lands, in order not to interrupt delivery of Federal water to these lands.

**§ 426.3 Authority.**

These regulations are promulgated pursuant to authority vested in the Secretary by Congress in the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 552, 553, and the Reclamation Act of 1902, as amended and supplemented, 32 Stat. 388, 43 U.S.C. 371 et seq. The basic requirement that the Bureau of Reclamation limit the sale of water rights or the delivery of project water to tracts of not more than 160 irrigable acres was initially contained in the Reclamation Act of June 17, 1902, and is, with comparatively few express statutory modifications or exceptions for particular projects, applicable to all reclamation-served lands. The acts pertinent to that basic requirement, as well as to the modifications, waivers, or exemptions, are identified in the following paragraphs.

(a) *Statutory Requirements for Excess Lands.* (1) Section 5, Act of June 17, 1902 (32 Stat. 389, 43 U.S.C. 392, 431, 439).

(2) Act of February 21, 1911 (36 Stat. 925, 43 U.S.C. 523).

(3) Section 46, Act of May 25, 1926 (44 Stat. 649, 43 U.S.C. 423e).

(b) *Exceptions and modifications*—(1) *Exempt from acreage limitation.* (i) Colorado-Big Thompson Project, Colorado, Act of June 16, 1938 (52 Stat. 764, 43 U.S.C. 386).

(ii) Truckee Storage and Humboldt Projects, Nevada, Act of November 29, 1940 (54 Stat. 1219).

(iii) Owl Creek Unit, Missouri River Basin Project, Act of August 28, 1954 (68 Stat. 890).

(iv) Santa Maria Project, California, Act of September 3, 1954 (68 Stat. 1190).

(v) Beaverhead Valley, Montana, East Bench Unit, Mis-

souri River Basin Project, Act of July 24, 1957 (71 Stat. 309).

(vi) San Felipe Division, Central Valley Project, California (North and South Santa Clara Subareas only), Section 5, Act of August 27, 1967 (81 Stat. 173, 43 U.S.C. 616fff-5).

(vii) Narrows Units, Missouri River Basin Project, Colorado, Act of August 28, 1970 (84 Stat. 830).

(2) *Modifications of acreage limitation.* (i) Projects constructed pursuant to the Water Conservation and Utilization Act of August 11, 1939 (53 Stat. 1418, 16 U.S.C. 5902(2), as amended by the Act of October 14, 1940 (54 Stat. 1121).

(ii) San Luis Valley Project, Colorado, Act of June 27, 1952 (66 Stat. 282).

(iii) Nonexcess holding set at 480 irrigable acres, Kendrick Project, Wyoming, Act of September 4, 1957 (71 Stat. 608).

(c) *Acreage equivalency*—(1) *Land equivalent to 120 acres of Class 1 land.* (i) Baker Project (Upper Division), Oregon, Act of September 27, 1962 (76 Stat. 634, 43 U.S.C. 616u).

(2) *Land equivalent to 130 acres of Class 1 land.* (i) East Bench Unit (bench lands only), Missouri River Basin Project, Montana, Act of July 24, 1957 (71 Stat. 309).

(3) *Land equivalent to 160 acres of Class 1 land.* (i) Seedskadee Project, Wyoming, Act of August 28, 1958 (72 Stat. 963).

(ii) Savory-Pot Hook Project, Colorado-Wyoming, Act of September 2, 1964 (78 Stat. 852, 43 U.S.C. 616jj).

(iii) Bostwick Park Project, Colorado, Act of September 2, 1964 (78 Stat. 852, 43 U.S.C. 616jj).

- (iv) Fruitland Mesa Project, Colorado, Act of September 2, 1964 (78 Stat. 852, 43 U.S.C. 616jj).
- (v) Animas-La Plata Project, Colorado-New Mexico, Act of September 30, 1968 (82 Stat. 885).
- (vi) Dolores Project, Colorado, Act of September 30, 1968 (82 Stat. 885).
- (vii) Dallas Creek Project, Colorado, Act of September 30, 1968 (82 Stat. 885).
- (viii) San Miguel Project, Colorado, Act of September 30, 1968 (82 Stat. 885).
- (ix) West Divide Project, Colorado, Act of September 30, 1968 (82 Stat. 885).
- (x) Riverton Extension Unit, Missouri River Basin Project, Wyoming, Act of September 25, 1970 (84 Stat. 861).
- (xi) Polecat Bench Project, Wyoming, Act of March 11, 1976 (90 Stat. 205, 43 U.S.C. 615kkkk).
- (xii) Pollock-Herried Project, South Dakota, Act of March 11, 1976 (90 Stat. 208, 43 U.S.C. 6151111).
- (xiii) Kanapolis Unit, Pick-Sloan Missouri Basin Project, Kansas, Act of September 28, 1976 (90 Stat. 1324).
- (xiv) Oroville-Tonasket Unit Extension, Chief Joseph Dam Project, Washington, Act of September 28, 1976 (90 Stat. 1325).
- (xv) Uintah Unit, Central Utah Project, Utah, Act of September 28, 1976 (90 Stat. 1327).
- (xvi) Allen Camp Unit, Central Valley Project, California, Act of September 28, 1976 (90 Stat. 1328).

(d) *Use of interest payment for excess lands.* (1) Washoe Project, California-Nevada, Act of August 1, 1956 (70 Stat. 775, 43 U.S.C. 614).

(2) Small Reclamation Projects, Act of August 6, 1956 (70 Stat. 1044, 43 U.S.C. 422a-1), as amended.

(3) Mercedes Division, Lower Rio Grande Rehabilitation Project, Texas, Act of April 7, 1958 (72 Stat. 82).

(4) La Feria Division, Lower Rio Grande Rehabilitation Project, Texas, Act of September 22, 1959 (73 Stat. 641).

(e) *Delivery of project water to certain categories of excess lands.* (1) Involuntary acquisition of excess land

(i) Act of July 11, 1956 (70 Stat. 524, 43 U.S.C. 423e, 544).

(2) **Surviving Spouse**

(i) Act of September 2, 1860 (74 Stat. 732, 43 U.S.C. 423h).

(3) Columbia Basin Project, Washington, Act of October 1, 1962 (76 Stat. 678, 16 U.S.C. 835-1, 835c).

(4) States, their political subdivisions and agencies thereof, Act of July 7, 1970 (84 Stat. 411, 43 U.S.C. 425).

(5) Naval Air Station, Lemoore, California, Act of August 10, 1972 (86 Stat. 531).

(f) *Excess Land Provisions Modified by Acts of Congress Authorizing Execution of Specific Contracts Negotiated Pursuant to Section 7 of the Reclamation Project Act of 1939 (53 Stat. 1187, 43 U.S.C. 485f).* (1) Kittitas Reclamation District, Kittitas Division, Yakima Project, Washington, Act of May 6, 1949 (63 Stat. 64).

(2) Prosser Irrigation District, Yakima Project, Washington, Act of October 27, 1949 (63 Stat. 943).

(3) Roza Irrigation District, Yakima Project, Washington, Act of June 30, 1954 (68 Stat. 359).

(4) Vale Oregon Irrigation District, Vale Project, Oregon, Act of October 27, 1949 (63 Stat. 943).

(5) Frenchtown Irrigation District, Frenchtown Project, Montana, Act of June 23, 1952 (66 Stat. 153).

(6) Owyhee Irrigation District, Gem Irrigation District, Ridgeview Irrigation District, Advancement Irrigation District, Payette-Oregon Slope Irrigation District, Crystal Irrigation District, Bench Irrigation District, and Slide Irrigation District, Owyhee Project, Idaho-Oregon, Act of June 23, 1952 (66 Stat. 152).

(7) Gering and Ft. Laramie Irrigation District, Goshen Irrigation District, and Pathfinder Irrigation District, North Platte Project, Nebraska-Wyoming, Act of July 17, 1952 (66 Stat. 754).

(8) Hermiston Irrigation District and West Extension Irrigation District, Umatilla Project, Oregon, Act of June 18, 1954 (68 Stat. 254).

(9) North Unit Irrigation District, Deschutes Project, Oregon, Act of August 10, 1954 (62 Stat. 679).

(10) American Falls Reservoir District No. 2, Minidoka Project, Idaho, Act of August 21, 1954 (68 Stat. 762).

(11) Black Canyon Irrigation District, Boise Project, Idaho, Act of August 24, 1954 (68 Stat. 794).

(12) Tulelake Irrigation District, Klamath Project, California-Oregon, Act of August 1, 1956 (70 Stat. 799).

#### **§ 426.4 Definitions.**

(a) Irrigable lands, the area to which acreage limitations are applicable, is the net acreage possessing irrigated crop production potential, after excluding areas that are occupied by and currently used for homesites, farmstead buildings, and corollary permanent structures such as feed lots, equipment storage yards, and similar facilities, together with dedicated roads open for general unrestricted use by the public. Areas used for field roads, farm ditches and

drains, tail water ponds, temporary equipment storage, and other uses dependent on operational requirements necessary to produce a specific crop, and subject to change at will, are included in the net irrigable acreage.

(b) Nonexcess land is irrigable land beneficially held by one landowner that does not exceed the acreage permitted by statute. Unless otherwise authorized by statute, nonexcess land is 160 irrigable acres in the beneficial ownership of one individual or entity, or 320 acres owned jointly by husband and wife.

(c) Designated nonexcess is the land of an excess landowner which has been selected to be eligible to receive project water as his nonexcess land.

(d) Excess land is irrigable land served with water from any federal project under reclamation laws, exclusive of exempt acreage, beneficially held by one landowner which exceeds the statutory limit of acreage; i.e., which is in excess of that acreage which is nonexcess.

(e) Exempt land is that area of privately owned irrigable land to which the acreage limitation provisions do not apply. Exempt status may be based on the following: (1) Statutory exemptions. (i) Projects are listed in § 426.3(b)(1). (ii) Contracts in § 426.3(f) provide exemption when construction charges are fully paid out. (2) Exemptions based on determination by the Secretary, upon payout of construction charges, that a general pattern of family-size ownership has developed (Sol. Op. M-36634, 68 I.D. 372, 400-401, Note 73 (1961)).

(f) Secretary or contracting officer shall mean the Secretary of the Interior or his duly authorized representative.

(g) District shall mean any entity which has contracted with the United States for a water supply.

(h) Family relationships are persons in a direct lineal

descendant relationship (natural or adopted), and their spouses.

(i) Date of initial availability of water shall mean the date that project water becomes available to an irrigation block as determined by the Secretary.

(j) A resident owner is a landowner who has his or her principal place of residence either on land receiving water from a Federal project governed by reclamation law, or in the neighborhood of land receiving water from such a project, as determined by the Secretary.

(k) Neighborhood of the land is an area comprised of a maximum 50-mile radius from the particular tract of land receiving water from a Federal project governed by reclamation law. The Secretary may reduce the maximum radius, depending upon local conditions, where he determines that such reduction is appropriate to encourage family farming and the landowner's occupancy of the land benefited by the project.

(l) Eligible nonexcess owner is an individual who (1) has his or her principal place of residence on or in the neighborhood of the land or who has under oath stated his or her intent to establish such principal place of residence within three years of acquisition of the land; (2) will not, after the acquisition, be the owner ~~of~~ more than 160 acres of land which receives water from any Federal project governed by reclamation law; and (3) has met all other requirements of reclamation law and these rules.

(m) Project water is water that is furnished by or through Federally financed facilities to a District pursuant to a water service or repayment contract with the United States.

(n) Nonproject water is water from any other source to which the District has an appropriative right.

(o) Commingled water is that water comprising project and nonproject water delivered by or through a nonfederally constructed facility. If project and nonproject water is delivered by or through federally financed facilities, the nonproject water shall be considered project water and the acreage limitation and other requirements of Reclamation law shall apply to the users of such water.

(p) Class I equivalency for purposes of applying the class 1 equivalency in determining nonexcess acreage entitlement on those projects for which class 1 equivalency has been authorized, class 1 irrigable land is that arable land which, under a plan of essentially full water supply has the physical capability necessary for sustained long-term irrigation production; and, on the basis of both physical and economic land classification criteria applicable within the climatic limitations of each project, is determined by the Secretary of the Interior to have adequate income potential to support a family and pay water charges when irrigated in farm units of 160 acres or less.

(q) Beneficial owner of land is the entity deriving the benefit of ownership irrespective of the owner of record.

(r) A recordable contract is a document wherein the landowner agrees to sell his designated excess lands upon terms and conditions satisfactory to the Secretary and at prices not to exceed those fixed by the Secretary in order to receive project water for those excess lands. The contract must be recorded in the land records of the county in which the land is situated.

#### **§ 426.5 Deliveries of project water to excess land under special circumstances.**

The following circumstances permit delivery of water to excess land.

(a) *Recordable contract.*—(1) Excess land may receive project water only if the owner, under terms and conditions

satisfactory to the Secretary, executes a valid recordable contract for the sale of that land to a nonexcess owner. The sale price must not reflect value that can be attributed to the construction of the project. No excess land may become eligible to receive water by the execution of a recordable contract unless such excess land was, on the date of initial availability of water to the district, owned by the landowner requesting execution of the recordable contract. In cases where project water is made available to land through temporary diversion facilities provided by the landowner, the Secretary may establish the date of initial availability of water for that land at the date of such temporary diversion.

(2) Recordable contracts shall provide that: (i) The land-owner shall dispose of his excess land at an approved price to an eligible nonexcess owner within 5 years, except that the disposition period of existing recordable contracts or specified in existing water service or repayment contracts shall remain unchanged. Unless otherwise specified in a district contract entered into prior to the promulgation of these regulations, the recordable contract period shall begin at the date of initial availability of water. (ii) If the disposition of the land is not completed by the end of the required period, irrevocable power of attorney vests in the Secretary as attorney in fact for the landowner to sell the lands under such conditions as are deemed suitable by the Secretary. (iii) Prior to maturity of a recordable contract, excess land may, with approval of the contracting officer, be withdrawn from contract coverage and redesignated nonexcess: *Provided*, That an equal acreage of land theretofore designated nonexcess is substituted and becomes subject to all the terms of the recordable contract as though it were originally included therein. (iv) Recordable contracts shall not terminate until the sale of the land is consummated as approved by the Secretary.

(b) *Involuntary acquisition of excess land.*—Project water may be delivered to lands which become excess when acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgage, by inheritance, or by devise, subject to the following conditions: (1) Delivery is allowed only for a period of up to 5 years from the date of acquisition. Thereafter, delivery of water shall cease until the land is transferred to an eligible nonexcess owner. (2) The right to such temporary water deliveries is not transferable. (3) During the period of temporary water delivery, the land may be disposed of to nonexcess status without requiring price approval. (4) If the lands are not disposed of during the 5-year period, they become ineligible to receive project water until transferred to an eligible land-owner at an approved price. Price approval will be required until one-half of the total construction costs allocated to irrigation have been paid in regular scheduled installments on the total construction obligation to which the lands are subject. (5) Such lands are not eligible to be placed under recordable contracts.

(c) *Lands acquired by surviving spouse.*—Nonexcess lands which become excess to the ownership of a surviving spouse upon the death of a husband or wife may receive project water so long as the surviving spouse does not remarry. (1) The right to such temporary water deliveries is not transferable. (2) Prior to remarriage, the surviving spouse may dispose of such land to an eligible buyer without forfeiting the right of the land to receive project water, and without obtaining price approval if such approval is no longer required under § 426.9(b).

(d) *Excess lands owned by States, political subdivisions, and Agencies thereof.*—Such lands are eligible for project water subject to the following conditions: (1) Excess lands are exempt from the acreage limitation provisions so long as they are farmed primarily in the direct furtherance of a non-revenue-producing public function, as determined by the Secretary of the Interior. (2) Excess

lands used for a purpose other than that set forth in paragraph (d) (1) of this section may receive project water if a valid recordable contract requiring the sale of such lands within 10 years from the date of such contract has been executed under terms and conditions satisfactory to the Secretary but without limitation upon selling price. (3) Lands not under recordable contract or farmed as a public function as provided in paragraph (d) (1) of this section may be leased until July 7, 1995, to lessees whose fee lands in combination with the leased State lands do not exceed the lessees' nonexcess entitlement. The sale price of such land shall not reflect value that can be attributed to the construction of the project.

(e) *Lands administered or controlled by Federal Agencies.*—If project water is delivered to lessees on Federal lands for farming purposes, the lessee shall be bound by the same acreage limitations as a landowner.

**§ 426.6 Lands not eligible to receive project benefits.**

(a) Excess lands not covered by a recordable contract shall not be considered eligible to receive water from a project unless exempt from acreage limitation by law.

(b) Land acquired into excess status after the announced date of initial availability of project water thereto is not eligible to be placed under recordable contract.

(c) Excess lands may not be acquired subject to a recordable contract and continue to receive project water by virtue of that contract except that, in the discretion of the Secretary, land involuntarily acquired by inheritance, foreclosure, or other operation of law, may retain the remaining eligibility provided in the recordable contract upon execution of an assumption agreement in a form approved by the Secretary.

**§ 426.7 Types of land ownership.**

Reclamation law imposes no restriction on the amount of land that may be owned by an individual or group of individuals. The law restricts only the portion of land to which project water may be delivered or which may benefit from project facilities. For purposes of administering the acreage limitation provisions, the eligibility of lands is determined by the status of the owner or owners. After these regulations become effective, the Secretary will approve the sale of excess lands, at a price not reflecting project benefits and established by appraisal as described in §426.12, only to prospective owners who comply with the following forms of ownership.

(a) *Single ownerships.*—(1) A single eligible nonexcess owner holds title to land in a sole and separate ownership. (2) A corporation composed of a single eligible nonexcess owner holds title to land in a sole and separate ownership.

(b) *Multiple ownerships.*—Ownerships, including but not limited to tenancies in common, joint tenancies, and tenancies by the entirety, must comply with the following in order to hold more than 160 acres: (1) A family relationship must exist among all persons having a beneficial interest in the property, and (2) all persons having such beneficial interest must qualify as an eligible nonexcess owner.

(c) *Partnerships.*—A partnership must comply with the following in order to hold more than 160 acres: (1) a family relationship must exist among all the partners, (2) each partner must qualify as an eligible nonexcess owner, and (3) each partner has a right to partition or alienate his share of the property.

(d) *Corporations.*—A corporation must comply with the following in order to hold more than 160 acres: (1) A family relationship must exist among all the shareholders, and (2) each shareholder must qualify as an eligible nonexcess owner.

(e) *Trusts.*—Multiple beneficiary trusts may be utilized to hold up to one nonexcess entitlement of land receiving project water per beneficiary provided: (1) A family relationship exists among all beneficiaries. (2) Each beneficiary qualifies as an eligible nonexcess owner. (3) The trustee is unrelated to the trustor or the beneficiaries and is not an employee of the trustor. (4) The trust is irrevocable and constitutes a grant of all ownership, dominion, and control over a specifically described parcel of land. (5) The trust property consists solely of the land granted. (6) The trust document identifies each person who is a beneficiary and prescribes the undivided interest of each in the trust property, which undivided interest in no event shall represent a share in the total corpus of the trust greater than the ratio of one nonexcess entitlement to the total acreage of the trust. (7) The trustee named receives only compensation for management services, and neither acquires any interest of a beneficiary nor transacts in his individual capacity any business with the trust. Any attempt to do either shall be void. (8) The trustee makes periodic distribution of net returns from operations to beneficiaries in proportion to their undivided interests in the trust property. (9) If at any time the undivided interest of a beneficiary represents an area of land excess to that which he might hold as a nonexcess owner, the trustee shall designate a specific tract of the land in the trust equivalent to such excess. In the absence of such designation all land in the trust shall be deemed excess so long as that situation continues to exist. If a beneficiary acquires other land not in the trust which, together with his beneficial interest, exceeds that which he may hold as a nonexcess owner, the land not in the trust shall to the extent of such excess be deemed excess land. (10) Each beneficiary or guardian has the right, at his option, to a partition within the trust of his interest in the trust.

**§ 426.8 Leases.**

No person or legal entity shall be entitled to lease more than 160 acres of land served by federal water provided pursuant to the reclamation laws. Each lease of lands served by federal water must be filed with the District, which shall maintain a file for public inspection and report to the Department annually on the outstanding leases of lands within the District served by federal water.

**§ 426.9 Nonexcess land.**

An owner holding only nonexcess land may receive project water without designating his nonexcess holdings.

(a) *Designation.*—(1) An excess landowner must designate the land that is entitled to receive project water as nonexcess land in accordance with the district contract with the United States. If he or she fails to do so within the specified time, the district shall make the designation and if it fails to do so, the Secretary will make the designation. (2) A landowner may, with the consent of the contracting officer, redesignate other lands as nonexcess: *Provided*, That: A like acreage becomes excess under the same terms and conditions as if such land had been excess at the time of the original designation and either (i) the land was acquired from nonexcess status or (ii) the land was acquired from excess status in an approved sale.

(b) *Period for which price approval is required for non-excess land acquired from excess status.*—Nonexcess land acquired from excess status for an approved price must be sold at a price approved by the Secretary as not reflecting project benefits if resold within 10 years from the date of acquisition into nonexcess status to retain its eligibility to receive project water. For a period after 10 years and until one-half of the total construction costs allocated to irrigation have been paid in regularly scheduled installments on the total construction obligation in which the lands are situated, the Secretary shall monitor any resale to prevent unreasonable profit from accruing to the seller.

**§ 426.10 Disposition of excess lands.**

(a) Excess lands must be disposed of to an eligible non-excess owner, at a price approved by the Secretary, based on their bona fide value at date of appraisal without reference to the enhancement attributable to the construction of project works, to become eligible to receive project water in the hands of the purchaser. (1) Price approval for all excess lands will be required until one-half of the total construction costs allocated to irrigation have been paid in regularly scheduled installments on the total construction obligation of the project in which the lands are situated. (2) Price approval will be required for all land under recordable contract, regardless of the status of payment of construction charges.

(b) The excess landowner shall, no later than one year before power of attorney vests in the Secretary, divide his land under recordable contract into parcels of no more than 160 acres. If he or she fails to do so, the District shall, and if it fails to do so, the Secretary shall divide the land. (1) When the excess landowner desires to sell, and in no event less than six months before the power of attorney vests in the Secretary as provided in the recordable contract, the Secretary shall publish widely a notice of availability of such land, which describes the land and its possible uses, and which includes the expiration date of the recordable contract. (2) All prospective eligible nonexcess owners interested in purchasing a particular parcel shall file with the Regional Director a formal expression of interest which will describe their financial and other capacity to own and farm the land. (3) When the owner of the particular parcel under recordable contract desires to sell the land, or when power of attorney vests in the Secretary under the recordable contract, the Bureau shall select, by lottery or other impartial means from those expressing an interest, a purchaser of the land at the approved price; *Provided*, That a person in a family relationship with the excess land seller shall have a preference to buy the land offered. (4) The

prospective purchaser shall have ninety days to obtain financing. Extension of this period may be granted upon good cause. Such financing must comply with reasonable terms established by the owner, or, if power of attorney has vested, with the terms of the district contract with the United States.

- (c) When several purchasers obtain financing under a single loan instrument, the instrument must provide a partial release upon payment in full on the part of any single landowner.
- (d) Lands may not be obligated for the indebtedness of another.
- (e) The seller will not be permitted to lease the land back from the purchaser. The seller must not retain any interest in the land sold other than a purchase money mortgage or other equivalent purchase money security instrument.
- (f) Personal and nonfixture farm property must be sold separately. The purchaser shall not be required to purchase personal and nonfixture farm property as a condition to purchasing the land.
- (g) Appraisals will be made in accordance with the guidelines and principles set forth in the controlling water service or repayment contract or as prescribed in § 426.12.
- (h) To be eligible to receive project water, lands disposed of by gift deed must be submitted for approval in the same manner as though the disposition was made in a bona fide sale.
- (i) A contract under which the owner of land agrees to sell the land to another person is an acceptable means of transferring the beneficial interest of land only if the contract is recorded and made a part of the official records in the county in which the land lies.
- (j) An individual may accumulatively purchase or hold excess lands up to a full entitlement only once.

**§ 426.11 Commingling.**

(a) Project water may be stored in or transported from, through, or by means of nonfederally constructed facilities used to convey nonproject water if, in the opinion of the Secretary, such mingling is necessary to avoid duplication of facilities. The provisions of Reclamation law and of these regulations shall be applicable only to the quantity of project water thus involved. (1) When mingling of project water with nonproject water is permitted, the contractor shall be required to take such actions, keep such records, and install and maintain such measuring devices as in the opinion of the Secretary are necessary to ensure that at no time is the quantity of water delivered to, or removed as drainage water from, lands ineligible for project irrigation benefits under Reclamation law greater than the quantity introduced from nonproject sources.

(b) The provisions of paragraph (a) of this section shall apply to any irrigation facility constructed jointly by Federal and State interests, unless specifically exempted by Congress.

**§ 426.12 Appraisals of excess land.**

All appraisals of excess land shall be made consistent with the following provisions:

(a) Such appraisals shall be based on fair market value of the land at the time of appraisal, not including the increment resulting from the construction of a project.

(b) Appraisals of excess land will be made upon request of the landowner or a prospective buyer, or when power of attorney, provided for in a recordable contract, vests in the Secretary.

(c) All appraisals of excess land shall be made by an appraiser or panel of three appraisers designated by the Secretary. The party or parties requesting the appraisal may determine whether the appraisal is to be made by a

single appraiser or a panel of appraisers. The cost of the first appraisal, if requested by the landowner or determined necessary by the Secretary, shall be paid by the United States. The cost of all other appraisals shall be paid by the party or parties requesting the appraisal and shall be paid for under terms and conditions determined by the Secretary.

(d) The value of all improvements on excess land such as structures, wells, pumps, permanent plantings and other property that may be included with a sale of excess land consistent with § 426.10(f) shall be appraised on the basis of its fair market value in accordance with standard appraisal procedures.

(e) The Secretary shall determine the amount of nonproject water supply available to the designated property giving consideration to any riparian, adjudicated, or appropriated water rights. If an unadjudicated underground water supply is involved, an allocation will be made of the total available nonproject water in the aquifer as of the date of first water delivery to the district reduced by the quantity that would have been used on the basis of preproject crops and cropping patterns to an amount that would have been available on the date of appraisal, and supplemented by an allocation from the annual nonproject recharge to the aquifer from all locally available sources. The value of the designated property will reflect, among other things, the projected remaining economic life of the nonproject water supply, on the date of appraisal, as determined by the Secretary considering preproject crops and cropping patterns and annual nonproject recharge.

(f) Appraisals of excess lands that are requested after the sale has been consummated will not be approved by the Secretary. Excess lands sold without receiving prior price approval will not be eligible to receive project water until sold in accordance with procedures established by these regulations.

**§ 426.13 Class I equivalency.**

(a) Class I land as defined in § 426.4(p) and irrigable lands in lower land classes will be determined in accordance with established procedures used by the Bureau of Reclamation to classify the irrigable land on a project whereby economic factors such as productive capacity of the land, taking into consideration cropping limitations imposed by latitude and climate, farm production costs and land development costs, are correlated with physical factors such as soil, topography, drainage and quality of water.

(b) Class 1 equivalency factors are determined by comparing the productive potential of class 1 land, under average management, with the productive potential of lower class land so as to quantify the relationship of an acre of class 1 land to an acre of each of the lower classes of land in the project, (1) Class 1 equivalent acreage is determined through the application of factorial equivalents that will approximately equate the farm unit acreage of land of lower economic productivity to the economic productivity potential of class 1 land. Factorial equivalents based on physical and economic criteria shall be determined by the Secretary. For example, class 1=.1, class 2=.8, class 3=.6 and class 4=.5, or .8, .6 and .5 acre of class 1 land equals 1 acre of class 2, class 3 and class 4 land respectively.

(c) An individual's nonexcess entitlement using the class 1 equivalency concept, if authorized for a project, will be determined on the basis of his landholding in each land class. Nonexcess acreage of irrigable land classes below class 1 shall be determined through class 1 equivalency factors on the basis of the acres of such lower classes in excess of 160 acres which are necessary in weighted total acres held in single ownership to be equivalent to the acres of class 1 determined by the Secretary as adequate to support a family and pay water charges. The nonexcess entitlement of a landowner will be designated by the landowner, district or the Secretary in accordance with estab-

lished procedures set forth in standard language used for water service and repayment contracts. The nonexcess entitlement designation may consist of a combination of the acreage of each land class as determined when the designation is made and may not be revised unless prior approval is given by the contracting officer.

(d) Class 1 equivalency can be used by a district only if its repayment or water service contract with the United States is amended to incorporate provision for the use of the class 1 equivalency concept as authorized by law.

(e) Class 1 equivalency factors that are established for a district will be published in the FEDERAL REGISTER at least 60 days prior to their application to lands of the district.

#### **§ 426.14 Decisions and appeals.**

The Regional Director acting as designee of the Secretary shall make the determination required under these rules and regulations. A party directly affected by such determination may appeal in writing to the Commissioner of the Bureau of Reclamation within 30 days of receipt of the Regional Director's determination. The affected party shall have an additional 30 days thereafter within which to submit a supporting brief or memorandum to the Commissioner. The Regional Director's determination will be held in abeyance until the Commissioner has reviewed the matter and rendered a decision. Pertinent addresses are shown below:

[Addresses omitted.]

**APPENDIX T**  
**AFFIDAVIT OF ROBERT F. CARTER**

COUNTY OF IMPERIAL )  
STATE OF CALIFORNIA )  
                          )  
                          )  
                          ) SS.

Robert F. Carter, being first duly sworn, deposes and says:

I am presently Executive Officer to the Board of Directors of Imperial Irrigation District, petitioner herein. I was formerly General Manager of Imperial Irrigation District and I am familiar with all of its records, including the contract between Imperial Irrigation District and the United States dated December 1, 1932, for construction of the All-American Canal, and the supplement thereto dated March 4, 1952.

The total obligation of Imperial Irrigation District to the United States for construction of the All-American Canal was originally in the amount of \$25,020,000.00. Installments have been paid from time to time as provided in said contract, and, as of March 1, 1978, the balance owing was \$12,385,000.00, less than one half of the original total.

/s/ Robert F. Carter  
ROBERT F. CARTER

Subscribed and sworn to before me this 30th day of  
August, 1979.

/s/ C.J. Staab  
NOTARY PUBLIC

My commission expires June 6, 1980

**APPENDIX U**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA**

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**UNITED STATES OF AMERICA,**

*Plaintiff,*

**v.**

**IMPERIAL IRRIGATION DISTRICT, a corporation,**

*Defendant,*

**JOHN M. BRYANT, et al., Intervenors, both individually  
and on behalf of members of a class, to-wit, all persons  
owning more than 160 acres of irrigable land within the  
Imperial Irrigation District,**

**STATE OF CALIFORNIA,**

*Intervenor,*

**BEN YELLEN, et al.,**

*Applicants for Intervention.*

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**Civil No. 67-7-T**

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**AFFIDAVIT OF BEN YELLEN IN SUPPORT OF  
MOTION TO INTERVENE**

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**STATE OF CALIFORNIA )  
COUNTY OF IMPERIAL ) ss.  
                          )**

BEN YELLEN, being duly sworn, deposes and says:

1. I am one of the petitioners for intervention in this action. I am also one of the plaintiffs in Civil Action No. 69-124 now pending in this court, entitled, "Ben Yellen, et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants". The latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C.A. Section 431 against absentee landowners.
2. My address is 128 South 8th Street, Brawley, California.
3. My occupation is physician.
4. For more than the past five years, I have been personally acquainted with all of the other petitioners who are now seeking to intervene in this proceeding. Most of said petitioners are agricultural workers who have been so employed within the Imperial Valley and in particular within the geographical boundaries of the Imperial Irrigation District. None of the petitioners, including myself, own farm land anywhere in the United States, and all of us wish to own land and to engage in farming on that land.
5. If the Government had prevailed in this litigation, the Applicants and persons similarly situated would attempt to purchase the excess lands under the terms and conditions set by the Secretary of the Interior.
6. I am acquainted with the cost of land within the Imperial Irrigation District. Land that is without water has a market value and sells for approximately \$25.00 to \$50.00 per acre. Land that is irrigated with federal reclamation water by the Imperial Irrigation District has a value and sells for between \$1200.00 to \$1400.00 per acre.
7. As a practical matter, the applicants are unable to purchase irrigated lands unless the Government appeals the judgment of this Court and ultimately prevails, so that

the excess lands will be sold under reasonable terms and conditions set by the Secretary of the Interior.

/s/ Ben Yellen

Subscribed and sworn to before me on March 14, 1971.

/s/ Jean H. Schmitt  
Notary Public

## APPENDIX V

**Summary of Administrative Practice of  
the Department of the Interior Relating to the  
Inapplicability of the Excess Land Laws  
to Imperial Irrigation District**

February 24, 1933. Opinion letter issued by Secretary Ray Lyman Wilbur advising that the acreage limitation of the reclamation law did not apply to private lands in the Imperial Valley.

March 20, 1934-June 22, 1936. Secretary Harold Ickes allocated \$22 million to the Canal from various public works and relief acts in his dual role as Director of the Public Works Administration and Secretary of Interior. For example, "allotments" of \$6,000,000 came from the National Industrial Recovery Act of June 16, 1933, 48 Stat. 275, \$3,000,000 from the Emergency Appropriation Act of 1934, 48 Stat. 1055, and \$3,000,000 from the Act of April 8, 1935, 49 Stat. 115. See *Interior Department Appropriation Bill, 1937: Hearings before Subcommittee of House Committee on Appropriations*, 74th Cong., 2d Sess. 1162 (1936), and *Interior Department Appropriations Bill, 1936: Hearings before Subcommittee of House Committee on Appropriations*, 74th Cong., 1st Sess. 101 (1935). Prior to June 22, 1936, all funding for the All-American Canal came from discretionary funds. After June 22, 1936, the All-American Canal became a line-item in the Interior Department's budget. See Appropriation Act of June 22, 1936, 49 Stat. 1785.

February 26, 1934. The judgment of *Hewes v. All Persons* became final, confirming the validity and legality of the contract, when the California Supreme Court granted the parties' motions to dismiss. Exactly one month before this, counsel for Malan wrote to Secretary Ickes objecting to statements made by the Secretary blaming the litigants

for project delays which were perceived as placing undue pressure on Malan to dismiss the appeal.

1941. Issuance of a report entitled "The Excess Land Provision of the Federal Reclamation Law," prepared by B.P. King, attorney in the Bureau of Reclamation, pursuant to Secretary Ickes' instructions, concluding that the excess lands provisions of the federal reclamation law were not applicable to the Imperial Valley.

1942. Commissioner Page of the Bureau of Reclamation advised the General Counsel of the Federal Land Bank, which was making loans on farms lands in the District, that the limitation did not apply to lands within the Imperial Irrigation District.

1946. Publication by the Bureau of Reclamation of a survey entitled, "Landownership Survey on Federal Reclamation Projects," which stated that there was no excess land acreage in the Imperial Valley.

May 31, 1945. Opinion by Solicitor Fowler Harper stating that the acreage limitation provision of reclamation laws should be incorporated in the Coachella supplemental contract, but noting that Imperial Valley was exempt from the excess land law.

1948. Secretary Krug reaffirmed the original opinion of Secretary Wilbur.

February 5, 1958. Letter from Interior Department Solicitor Bennett to the Solicitor General of the United States, in connection with the then pending case of *Arizona v. California*, confirming the Interior Department's policy that the acreage limitation did not apply to Imperial Irrigation District.

